(32,682)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 242

J. W. HAMPTON, JR., & CO., PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS

INDEX

	Original	Print
Record from court of customs appeals	1	1
Petition for review	1	1
Schedule "A"—Importations and entries protested	2	2
Schedule "B"—Assignments of error	2	2
Return of board of appraisers	7	6
Proceedings before board of U. S. general appraisers	8	7
Protest of J. W. Hampton & Co	8	7
Report of collector	9	9
Answer to protest	11	10
Stipulation re evidence, etc	11	10
Opinion, McClelland, G. A	12	11
Concurring opinion, Sullivan, G. A	27	25
Dissenting opinion, Brown, G. A	44	42
Judgment	74	71
Order allowing filing of brief as amicus curiæ	75	71
Argument and submission (omitted in printing)	75	
Certificate of importance	76	72
Opinion, Graham, J	77	73
Judgment	102	105
Certificate re mandate	102	105
Clerk's certificate (omitted in printing)	103	
Order allowing certiorari	104	106

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 21, 1927

[fols. a-1]

IN UNITED STATES COURT OF CUSTOMS APPEALS

Suit No. 2761

Protest No. 92874-G/19385

J. W. HAMPTON, JR., & Co., Appellants,

vs.

THE UNITED STATES, Appellee

PETITION FOR REVIEW—Filed April 24, 1926

To the Honorable the United States Court of Customs Appeals:

Your petitioner, having complied with the statutes in such case made and provided, and being dissatisfied with the decisions and decree of judgment of the Board of United State General Appraisers made within sixty days immediately preceding the date hereof in each of the matters set forth and referred to in the annexed Schedule A, which is hereby made a part hereof, as to the construction of the law and the facts respecting the classification of certain merchandise and the rate of duty imposed thereon under such classification, respectfully prays that the said Court of Customs Appeals review the questions of law and fact involved in said decisions, and for that purpose prays that an order be entered requiring the said Board of Appraisers to return to said Court of Customs Appeals the record and evidence taken by them, together with a certified statement of the facts involved in each of the said matters and their decisions thereon. And your petitioner also prays for such other or further orders or relief in the premises as the statutes provide or to the Court shall seem just.

[fol. 2] The particulars of the errors of law and fact involved in said decisions of said Board of Appraisers of which your petitioner complains are set forth in the an-

nexed Schedule B which is hereby referred to and made a part hereof.

Dated New York, April 23, 1926.

J. W. Hampton, Jr., & Co., Petitioner, by Walter Evans Hampton, Attorney, 17 Battery Place, New York City.

SCHEDULE A TO PETITION

The following are the importations and entries covered by this proceeding, with the approximate dates thereof, and with such other data as are convenient for purposes of identification:

Entry No.	Vessel.	Entered.	Protest No.	Decision.
W. 37133	Port Macquarrie.....	6/20/24	92874G/19385	April 6, 1926
917135	Port Macquarrie.....	6/20/24	92874G/19385	April 6, 1926
918818	Port Macquarrie.....	6/20/25	92874G/19385	April 6, 1926

SCHEDULE B TO PETITION

Assignments of Error

The Board of United States General Appraisers has confirmed the action of the Collector of the Port of New York, in assessing and exacting duty at Six (6) cents per pound on Barium Dioxide, thereby making errors of law and fact by failing to find, or finding the contrary of, the following proposition:

I. In not sustaining the protest and overruling the same.

II. In not holding the merchandise dutiable at four (4) cents per pound, under paragraph 12, of the Tariff Act of September, 1922.

III. In not holding that the assessment and liquidation purported to have been made under authority of the Presi- [fol. 3] dent, by Section 315, Title III, of said act, is unconstitutional and void; that the President's proclamation, dated May 19, 1924, T. D. 40216, is unconstitutional and void.

IV. In not holding that the assessment was made by reason of an illegal delegation to the Executive Department by the Congress of the United States, of the power to legislate, which power, by the Federal Constitution, is solely committed to Congress. (Art. 1, Sec. 1.)

V. In not holding the assessment was made under an illegal delegation to the Executive Department, by the Congress of the power to tax, which power is alone lodged in the Congress of the United States. (Art. 1, Sec. 8.)

VI. In not holding that even if the act or acts was or were done by constitutional delegation of legislative power of the taxing power, that Sec. 315, of said Act, purports on its face to make a levy, not for raising public revenue, but under a declared policy for protection to American industries, based upon the difference of cost of production at home and abroad, and based upon the selling prices abroad and at home, all of which is not a tax or duty within the meaning of the Federal Constitution.

VII. In not holding that the Collector's action, the act or acts of the Tariff Commission, and the act of the President of the United States, were singly and collectively, null and void, being unconstitutional; that is to say, being contrary to the expressed provisions of the Federal Constitution and the specific grants of power bestowed by the people to, and in the Congress of the United States, as specifically provided for by the Constitution.

VIII. In not holding the Federal Legislature cannot delegate its executive grant of power to legislate; and cannot delegate its exclusive grant of power to tax.

IX. In not holding that said powers were alone and exclusively granted to the Federal Legislature by the people of the sovereign states.

X. In not holding that the section in question, on its face and by its context, clearly shows designs to be accomplished other than that of raising revenue, and that said design or designs were to secure and maintain a special [fol. 4] policy for special interests, and not for general Government taxation purposes.

XI. In holding that the delegation by the Congress to the President of the powers expressed in sec. 315, was not a delegation of legislative authority, or of the power to tax in violation of Sections 1 and 8, of Article 1, of the Federal Constitution.

XII. In holding that the President, in making such investigation, and in determining the difference between the cost of production of Barium Dioxide in the United States and in Germany, as well as fixing the rate of duty which would equal such difference, was but carrying out the expressed will of Congress, and such action was therefore, in no sense, a usurpation of the constitutional privileges of that body.

XIII. In not holding that the alleged facts which the Executive is to determine, cannot be, and are not precisely sfated by the Legislature, and therefore, cannot be certainly ascertained by the Executive.

XIV. In not holding that the act was incomplete in præsenti.

XV. In holding and reasoning: "It is our view that the power thus vested in the President was definite and specific and left nothing to his discretion provided the purpose of the law clothing him with such power was faithfully carried out, and it is of course to be presumed the purpose of the law was faithfully executed."

XVI. In reasoning and holding: "Depending upon the proofs presented and the facts ascertained upon investigation it might have been definitely found that the difference in cost of production was anywhere, as we have said, from 1 to 50 per cent more than the rate being assessed under the tariff law in operation."

XVII. In holding: "In thus finding and proclaiming a duty of 6 cents per pound on barium dioxide the President did not legislate nor impose a tax."

XVIII. In holding: "The President in making such investigation and in determining the difference in such cost of production, as well as fixing a rate of duty which would [fol. 5] equal such difference, was carrying out the expressed will of Congress, and was in no sense usurping the constitutional privilege of that body."

XIX. In holding and reasoning: "In naming this rate Congress evidently did not ascertain the difference in the cost of production of this commodity in the United States and in the competing country."

XX. In reasoning and holding: "The medium through which the change in duty was to be determined did not depend on the one that made the investigation. It was the result that created the change."

XXI. In not holding that the Supreme Court has repeatedly recognized inherent limitations upon the Federal taxing power growing out of the separation of governmental powers and the necessary implications arising therefrom.

XXII. In holding that it is the duty of the courts to assume that every tax passed by the Legislature is valid; but that on the contrary, the duty is to scrutinize carefully the act of the Legislature to ascertain the extent thereof and its possibilities of destruction.

XXIII. In not holding that the scheme proposed in said section is impossible of being precisely stated for certain ascertainment by the Executive.

XXIV. In not holding: "The sole function of the courts, in relation to taxes, is to say whether they have been legally appraised and levied upon a proper construction of the statute or whether the statute is a violation of constitutional principles."

XXV. In not distinguishing between a tax and a toll.

XXVI. In not holding that there can be no lawful tax which is not laid for public purpose and that the levy here is not for public purposes, but for a special interest.

XXVII. In not holding that it is the duty of the judges to act for the benefit of the whole people and not merely as servants of the Assembly or Legislature.

XXVIII. In not holding and deciding: "It is the duty of all courts * * *, in deciding constitutional cases, to be eternally vigilant in guarding and defending the fundamental American principles and traditions which [fol. 6] that great instrument" (the Federal Constitution) "was designed to secure and perpetuate."

XXIX. In not holding that it was, and is, impossible, because of the very nature of the thing, to find reasonably, and not arbitrarily, and because of the inherent uncertainties thereof, the difference in cost of production at home and abroad.

XXX. In not distinguishing the issue here from the case of Field v. Clark (143 U. S., 649).

XXXI. In reasoning and holding that there is perfect analogy in Interstate Commerce matters and cases in the case at bar.

XXXII. In not reasoning and holding that in delegating to commissions and boards and the like, that the acts thereof are always subject to inquiry as to their reasonableness and whether or not they are arbitrary.

XXXIII. In reasoning and holding that the act of the President is similar, and in effect the same, as the action of the Board of United States General Appraisers in finding values of merchandise.

J. W. Hampton, Jr., & Co., Petitioner, by Walter Evans Hampton, Attorney, 17 Battery Place, New York City.

[File endorsement omitted.]

[fol. 7] IN U. S. COURT OF CUSTOMS APPEALS

[Title omitted]

RETURN OF BOARD OF U. S. GENERAL APPRAISERS

The petitioner above named, having applied to the United States Court of Customs Appeals for a review of the questions of law and fact involved in a decision of the Board of United States General Appraisers in the above case, and the said Court having ordered the Board to transmit to said Court the record, evidence, exhibits, and samples, together with a certified statement of the facts involved in the case and its decision thereon:

Now, therefore, pursuant to said order, the Board of United States General Appraisers does hereby transmit to said Court the record, evidence, exhibits, and samples in said case, together with a certified statement of the facts involved in the case, and also its decision thereon.

This return specifically comprises the following:-

A copy of

1. Protest 92874-G/19385 with the reports of the collector of customs and the United States Appraiser thereon.

2. Stipulation of counsel.

3. The Board's decision in question, G. A. 9116 (T. D. 41478), and judgment order.

The entry papers will be forwarded later.

Witness the Honorable W. B. Howell, President of the Board, this 11th day of May, A. D. 1926.

D. P. Dutcher, Chief Clerk. G. V. O. (Seal.)

Constitutionality—Flexible tariff.

[fol. 8] BEFORE BOARD OF U. S. GENERAL APPRAISERS

PROTEST 92874-G OF J. W. HAMPTON, JR., & CO.

80041, 80042, 80043

New York, N. Y., April 7, 1925.

To the Honorable the Collector of Customs, Port of New York, N. Y.

SIR: We hereby protest against your decision assessing duty at the rate of six (6) cents per pound, or other rate or rates, on certain merchandise known and assessed as Barium Dioxide, or Barium Peroxide, and or other merchandise, covered by entries below mentioned.

We claim that the merchandise is properly dutiable at four (4) cents per pound, under paragraph 12, of the Tariff Act of September 21, 1922.

We further claim that if the assessment and liquidation of duty is purposed to be made by authority of the President

under section 315, etc., Title III, of said act, it is unconstitutional and void; that the President's proclamation dated May 19, 1924, T. D. 40216, is unconstitutional and void:

(1) Because it is done under and by virtue of an illegal delegation to the Executive Department of the power to legislate, which power, by the Federal Constitution, is solely committed to Congress.

Article I

"Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

(2) Because it is done under an illegal delegation to the Executive Department of the power to tax, which power is alone lodged in the Congress of the United States by "Section 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, * * *."

(3) Even if in form it has been done by constitutional delegation of legislative power and of the taxing power, it purports on its face to make a levy, not for raising public [fol. 9] revenue, but under a declared policy for protection to American industries, based upon difference of cost of production at home and abroad, which is not a tax or duty within the meaning of the Federal Constitution.

We further claim that your action and decision, the acts of the Tariff Commission, and the act of the President of the United States, are singly, and collectively, null and void, being unconstitutional; that is to say, being contrary to the express provisions of the Federal Constitution and the specific grants of power bestowed only and contained in said Constitution.

Entry Nos.	Steamers.	Arrived.	Liquidated.	Mks. & Nos.
W. 37133	Port Macquarrie....	6/20/24	2/13/25	Var. 225 Drums
917125	Port Macquarrie....	6/24/24	3/12/25	Var. 15 Drums
918818	Port Macquarrie....	6/24/24	2/14/25	Var. 52 Drums

J. W. Hampton, Jr. & Co.

Notify Walter E. Hampton c/o J. W. Hampton, Jr. & Co., 17 Battery Place, New York, N. Y.

BEFORE BOARD OF U. S. GENERAL APPRAISERS

REPORT OF COLLECTOR

19385.
Name: J. W. Hampton, Jr. & Co.
Subject: Barium Peroxide.
Entry Nos. W. 37133, 917125, 918818.
92874-G.

Indorsed: Received May 6, 1925. Board of U. S. General Appraisers, D. P. Dutcher, chief clerk.

Indorsed: Received April 8, 1925. Custom House, New York.

[fol. 10] The date of entry, liquidation and protest are correctly specified herein, F. W. D.

19385. May 4, 1925.

Respectfully referred to the Board of U. S. General Appraisers for decision.

The entries herein enumerated cover importations of Barium Dioxide made in the S/S Port Macquarrie which arrived at this port on June 21, 1924 and subsequent to the proclamation by the President of the United States on the 19th day of May, 1924, directing, after due investigation and under the authority given him in Section 315 of the Tariff Act of 1922, an increase in the duty assessed on Barium Dioxide in Paragraph 12, from 4 to 6 cents per pound.

The president's proclamation increasing the rate of duty was published in T. D. 40216, and in pursuance to the instructions contained therein, this office assessed duty on the Barium Dioxide at 6 cents per pound.

Note the Appraiser's special report, herewith.

Entries Nos. 917125 and 918818 were made for consumption, and the merchandise released from Customs Custody under duty paid permits on June 24, 1924. The merchandise covered by warehouse bond entry 37133 was withdrawn as follows: 3 drums November 5, 1924, 75 drums November 7, 1924, 75 drums November 17, 1924. The remainder is still in store. Protest was received within the statutory time.

Philip Elting, Collector.

[fol. 11] BEFORE BOARD OF U. S. GENERAL APPRAISERS

ANSWER TO PROTEST

United States Customs Service, Appraiser's Office, Port of New York

4/29/25.

Protest No. 19385.
Importer: J. W. Hampton, Jr. & Co.
Invoice No. —.
Entry Nos. 917125, 918818.
Bond No. 37133.
Dates: 6/24/24, 6/20/24.

The merchandise is described on the invoices as barium peroxide and consists of barium dioxide. It was advisorily classified for duty by this office at 6c. per pound, in accordance with the President's proclamation of May 27, 1924, issued under Section 315-A of the Tariff Act of 1922, T. D. 40216.

Respectfully, F. J. H. Kracke, Appraiser.

Ex Bowen.

BEFORE BOARD OF U. S. GENERAL APPRAISERS, BOARD NO. 1
(CLASSIFICATION SIDE)

Protest No. 92874-G/19385

[Title omitted]

STIPULATION RE EVIDENCE, ETC.

It is hereby stipulated and agreed as follows:

That the Collector's letter transmitting the protest, the Appraiser's report, the custom house entry papers, and all other papers in the case, be admitted in evidence.

[fol. 12] That duty was taken by reason of T. D. 40216, 45 Treas. Dec., p. 669.

It is further stipulated that plaintiff have ten (10) days for brief, and that the United States have thirty (30) days therefrom.

Case is submitted.

W. E. Hampton, Attorney for Protestant. New York, N. Y., October 26, 1925. Fred J. Carter, Attorney for Government. New York, N. Y., October 26, 1925.

So ordered. Jerry B. Sullivan.

BEFORE BOARD OF UNITED STATES GENERAL APPRAISERS

G. A. 9116—T. D. 41478

Protest 92874-G/19385 of J. W. HAMPTON, JR., & COMPANY Against the Decision of the Collector of Customs at the Port of New York

Decided April 6, 1926

Before Board 1

OPINION

McCLELLAND, General Appraiser:

This is a protest against the classification of, and assessment of duty on, Barium Dioxide by the Collector of Customs at the Port of New York. The United States Appraiser in his special report on the protest to the collector states:

The merchandise is described on the invoice as barium peroxide and consists of barium dioxide. It was advisorily [fol. 13] classified for duty by this office at 6 cents per pound in accordance with the President's proclamation of May 27, 1924, issued under Section 315 A of the Tariff Act of 1922, T. D. 40216.

In harmony with the appraiser's report the collector assessed duty at six cents per pound and the importer duly protested against such assessment, claiming that the legal

rate of duty chargeable against such merchandise under the law in operation at the time of importation was four cents per pound. It is further claimed that if the collector's assessment at the six cent rate was "purposed to be made by authority of the President under Section 315, etc., Title III of said act, it is unconstitutional and void," and the President's proclamation was and is unconstitutional and void because it is done under and by virtue of an illegal delegation to the Executive Department of the power to legislate, which power by Article I of the Federal Constitution is solely committed to Congress.

Other grounds of objection to the said assessment are—

"Because it is done under an illegal delegation to the Executive Department of the power to tax, which power is alone lodged in the Congress of the United States by Section 8 of the United States Constitution which in so far as pertinent reads:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises, * * *"

"Even if in form it has been done by constitutional delegation of legislative power and of the taxing power, it imports on its face to make a levy, not for raising public revenue, but under a declared policy for protection to American industries, based upon difference of cost of production at home and abroad, which is not a tax within the meaning of the Federal Constitution.

"* * * that upon action and decision, the acts of the Tariff Commission, and the act of the President of the United States are singly and collectively, null and void, being unconstitutional, that is to say, being contrary to the express provisions of the Federal Constitution and the specific grants of power bestowed only — and contained in said Constitution."

[fol. 14] The pertinent parts of Section 315 which vested in the President the power to make the investigation and issue the proclamation complained against are as follows:

Sec. 315 (a). That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever

the President upon investigation of the differences in cost of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in cost of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the Islands of Guam and Tutuila): Provided, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any Amendatory Act.

* * * * * * *

(c) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices [fol. 15] of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such

investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties, interested to be present, to produce evidence and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

The following is the full text of the President's proclamation:

By the President of the United States of America—A Proclamation

"Whereas in and by Section 315 (a) of Title III of the Act of Congress approved September 21, 1922, entitled 'An act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, [fol. 16] and for other purposes,' it is, among other things, provided that whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in rates of duty provided in said act shown by said

ascertained differences in such costs of production necessary to equalize the same;

"Whereas in and by Section 315 (c) of said act it is further provided that in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of said section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition;

"Whereas, under and by virtue of said section of said act, the United States Tariff Commission has made an investigation to assist the President in ascertaining the differences in costs of production of and of all other facts and conditions enumerated in said section with respect to the article described in paragraph 12 of Title I of said Tariff Act of 1922, namely, barium dioxide, being wholly or in part the growth or product of the United States, and of and with respect to a like or similar article wholly or in part the growth or product of competing foreign countries; [fol. 17] "Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence, and to be heard;

"And whereas the President upon said investigation of said differences in costs of production of said article wholly or in part the growth or product of the United States and of the like or similar article wholly or in part the growth or product of competing foreign countries, has thereby found that the principal competing country is Germany and that the duty fixed in said title and act does not equalize the differences in costs of production in the United States and in said principal competing country, namely, Germany, and has ascertained and determined the increased rate of duty necessary to equalize the same.

"Now, therefore, I, Calvin Coolidge, President of the United States of America, do hereby determine and proclaim that the increase in the rate of duty provided in said act shown by said ascertained differences in said costs of production necessary to equalize the same is as follows:

"An increase in said duty on barium dioxide (within the limit of total increase provided for in said act) from 4 cents per pound to 6 cents per pound.

"In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done at the City of Washington this nineteenth day of May in the year of our Lord one thousand nine hundred and twenty-four, and of the Independence of the United States of America the one hundred and forty-eighth.

Calvin Coolidge.

"By the President: Charles E. Hughes, Secretary of State." (Seal.)

[fol. 18] The title of the Tariff Act of 1922 of which Section 315, supra, is part is—

"An act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes."

It is manifest from a mere reading of the title that the framers of this law and the Members of the Congress who voted in favor of its passage deliberately intended that the rates of duty to be imposed upon imported merchandise should be so regulated as to encourage,—yes, and protect as far as possible, the manufacturers of like merchandise in the United States against the lower cost of production of similar merchandise in foreign countries. This same purpose also was manifested in the titles of the Tariff Acts of 1897 and 1909 by the use of the words "Encourage the industries of the United States" in each of said titles, yet neither of these acts has been held to be unconstitutional because of its avowed purpose to encourage American industries, which is another name for the protection of such industries against the competition of merchandise produced in foreign countries at lower cost of production.

Narrowed down the issue presented must turn on the questions of whether—

(1) The power granted to the President under section 315, supra, is a delegation by the Congress of power to legislate, contrary to the provisions of Article 1, Section 1 of the Federal Constitution.

(2) The power so conferred on the President is a delegation of the power to tax which under the Constitution belongs exclusively to Congress.

The importance of such an issue as is here presented can not be overestimated, and courts therefore hesitate to declare statutes unconstitutional until such declaration may be made on clear and unmistakable grounds.

The question as to whether Section 315, supra, in so far as it confers on the President the power complained of is constitutional must be approached with recognition of a presumption in favor of the statute, and if, on final con-[fol. 19] sideration of such question there remains a doubt, such doubt must be construed to maintain the law. Cooley on Constitutional Limitation, 6th Ed. 216.)

A like question, involving the constitutionality of Section 3 of the Tariff Act of 1890, which vested in the President authority to suspend laws and impose duties within his discretion was presented to the Board of General Appraisers as far back as 1880, and Judge Somerville, writing the opinion for the Board, sustained the constitutionality of the law (G. A. 203, T. D. 10553). The protestants, whose cases were involved in that decision, appealed therefrom to the Circuit Courts of the United States in their respective districts, and in each instance the decision was affirmed. They were thereafter taken for review to the United States Supreme Court, where the constitutionality of the law was also sustained. See Field v. Clark (143 U. S. 649).

Section 3 of the Act of 1890, supra, the constitutionality of which was involved in that case, provided that——

"with a view to secure reciprocal trade with countries producing the following articles, and for this purpose * * * Whenever, and so often as the President shall be satisfied that the Government of any country producing and

exporting sugars, molasses, coffee, tea, and hides, * * * imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country as follows:"

Then follows an enumeration of the articles, together with the rates of duty that should be imposed thereon during such suspension.

[fol. 20] Mr. Justice Harlan, writing for the majority of the court in the Field case, supra, and especially with reference to Section 3, supra, said:

"To what extent do precedents in legislation sustain the validity of the action under consideration, so far as it makes the suspension of certain provisions and the going into operation of other provisions of an Act of Congress depend upon the action of the President based upon the occurrence of subsequent events, or the ascertainment by him of certain facts, to be made known by his proclamation? If we find that Congress has frequently, from the organization of the Government to the present time, conferred upon the President powers, with reference to trade and commerce, like those conferred by the third section of the Act of October 1, 1890, that fact is entitled to great weight in determining the question before us" (p. 683).

* * * * * * *

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The Act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense,

invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea and hides, Congress itself determined that the provisions of the Act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them, that imposed exactions and duties on the agricultural and other products of the United States, which the President deemed, that is, which he found to be, reciprocally unequal and unreasonable. Congress itself prescribed, in advance, the duties to be levied, collected and paid, on sugar, molasses, coffee, tea or hides, produced by or exported from such designated country while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left [fol. 21] to the determination of the President. The words, 'he may deem,' in the third section, of course, implied that the President would examine the commerical regulations of other countries producing and exporting sugar, molasses, coffee, tea and hides, and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the Act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and de-

clare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed.

"'The true distinction,' as Judge Ranney, speaking for the Supreme Court of Ohio, has well said, 'is between the delegation of power to make the law, which necessarily involves a descretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be [fol. 22] be done; to the latter no valid objection can be made.' Cincinnati, Wilmington, &c., Railroad v. Commissioners, 1 Ohio St. 88. In Moers v. City of Reading, 21 Penn. St. 188, 202, the language of the court was: 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So in Locke's Appeal, 72 Penn. St. 491, 498: 'To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the Legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.' The proper distinction, the court said, was this: The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation.'"

There is this distinction between the power vested in the President under Section 3, supra, and Section 315, supra. The rates of duty to be put in effect on the happening of certain contingencies were definitely named in Section 3, supra, whereas in Section 315, supra, it was left with the

President to fix a rate or rates which would equal the differences between the cost of production of merchandise of foreign manufacture and like merchandise manufactured in the United States, not to exceed 50 per centum of the rate named in the existing tariff law, and that in ascertaining the differences in such cost of production the President insofar as he might find it practicable, should take into consideration the differences in conditions in production including wages, cost of material and other items of cost of production of such or similar articles in the United States and in [fol. 23] competing countries as directed in the following paragraph of Section 315:

(c) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

To assist the President in ascertaining such differences in cost of production the Tariff Commission is required to make investigation, and in making such investigation to give reasonable public notice of its hearings and reasonable opportunity to the parties interested to be present to produce evidence and to be heard, and for the conduct of such hearings the Commission is authorized to adopt such reasonable rules and regulations as it may deem necessary.

In the instant case such an investigation was made and the President in his proclamation, supra, found that the duty fixed in Title I in the act of the Congress approved September 21, 1922, did not equal the differences between the cost of production in the United States and the cost of production in Germany of barium dioxide, and therefore determined and proclaimed an increase in duty on such

merchandise of fifty per cent over the rate named in Title I as aforesaid, to equal the difference between such cost of production in Germany and the United States.

At this point it becomes pertinent to consider whether there was in thus empowering the President to determine and proclaim a rate of duty a delegation of legislative power and a delegation of the power to tax in violation of the Constitution of the United States.

[fol. 24] It is our view that the power thus vested in the President was definite and specific and left nothing to his discretion provided the purpose of the law clothing him with such power was faithfully carried out, and it is of course to be presumed the purpose of the law was faithfully executed. Before determining whether he should proclaim any change in the rate of duty on barium dioxide the President was required to find the fact of difference between the cost of production in the United States and in Germany on barium dioxide, after investigation and opportunity given to parties interested to be heard. Depending upon the proofs presented and the facts ascertained upon investigation it might have been definitely found that the difference in cost of production was anywhere, as we have said, from one to fifty per cent more than the rate being assessed under the tariff law in operation. The President's finding was that the actual difference was 50 per cent and having so found there remained in him no discretion as to the rate of duty he should determine upon and proclaim imported barium dioxide should be subject to after the expiration of thirty days from the date of such proclamation.

In thus finding and proclaiming a duty of six cents per pound on barium dioxide the President did not legislate nor impose a tax. In what he did he simply carried out the expressed will of Congress.

In substance it is urged in the brief of counsel for protestants that an absolutely definite or accurate finding of the difference between the cost of production of barium dioxide in Germany and the United States is impossible. This may or may not be true, but at least we are bound to assume that with the resources at the President's command, and presumably used by him in the investigation, his finding of fact

was as nearly accurate as it was humanly possible to make it. Nothing more is to be hoped for in any case.

The members of this tribunal are judges of both the law and the fact in every case presented to them. The facts are found from the evidence presented and when the law is applied to the facts so found the rate and amount of the duty the citizen must pay is determined.

Section 402 of the Tariff Act of 1922 provides five values upon which duties may be levied on imported merchandise: (1) Foreign value; (2) export value; (3) United States value; (4) cost of production; (5) the American selling [fol. 25] price, under certain conditions. Findings of either of these values are made on the evidence presented in each case, but the more pertinent for illustration here is cost of production as defined in paragraph (e) of Section 402, supra, as follows:

(e) For the purpose of this title the cost of production of imported merchandise shall be the sum of—

(1) The cost of materials of, and of fabrication, manipulation, or other process employed in manufacturing or producing such or similar merchandise, at a time preceding the date of exportation of the particular merchandise under consideration which would ordinarily permit the manufacture or production of the particular merchandise under consideration in the usual course of business;

(2) The usual general expenses (not less than 10 per centum of such cost) in the case of such or similar merchandise;

(3) The cost of all containers and coverings of whatever nature, and all other costs, charges, and expenses incident to placing the particular merchandise under consideration in condition, packed ready for shipment to the United States; and

(4) An addition for profit (not less than 8 per centum of the sum of the amounts found under paragraphs (1) and (2) of this subdivision) equal to the profit which ordinarily is added, in the case of merchandise of the same general character as the particular merchandise under consideration, by manufacturers or producers in the country of man-

ufacture or production who are engaged in the production or manufacture of merchandise of the same class or kind.

It is true that the ascertainment of cost of production by this tribunal as above defined is a judicial proceeding, but we fail to comprehend why the finding of the President complained against might not be as accurate and reliable as a basis for the assessment of duty as a finding of cost of production by this Board.

[fol. 26] As was said in Buttfield v. Stranahan (192 U. S., 470), in construing the act to prevent the importation of impure and unwholesome tea—

The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. We are of opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute.

* * * * * * *

Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

Whether or not the Secretary of the Treasury failed to carry into effect the expressed purpose of Congress and established standards which operated to exclude teas which would have been entitled to admission had proper standards been adopted, is a question we are not called upon to consider. The sufficiency of the standards adopted by the Secretary of the Treasury was committed to his judgment,

to be honestly exercised, and if that were important there is no assertion here of bad faith or malice on the part of that officer in fixing the standards, or on the part of the defendant in the performance of the duties resting on him.

* * * * * * *

Congress in framing Section 315 manifestly contemplated that there might develop greater differences between costs of production of commodities in foreign countries and the [fol. 27] United States than existed at the time of the passage of the Tariff Act of 1922, and therefore delegated to the President the power to ascertain through investigation whether and to what extent such changes took place. The President in making such investigation and in determining the difference in such cost of production, as well as fixing a rate of duty which would equal such difference was carrying out the expressed will of Congress, and was in no sense usurping the constitutional privileges of that body.

For the reasons hereinbefore stated the protest must be overruled and the decision of the Collector affirmed.

Chas. P. McClelland, U. S. General Appraiser.

Before Board of U. S. General Appraisers

Concurring Opinion

Sullivan, General Appraiser:

In concurring in the judgment of General Appraiser McClelland as to the constitutionality of Section 315 (a) of the flexible provisions of the Tariff Act of 1922, I desire to present my reasons therefor:

The protest in this case was filed against the exaction of a duty of six cents per pound on certain barium dioxide, it being contended the duty should be four cents per pound, as provided in paragraph 12 of the Tariff Act of 1922; that the rate of six cents per pound is a proclaimed rate by the President as set forth in T. D. 40216, dated May 19, 1924, and is void as being legislation.

The law empowering him to do so is found in the Tariff Act of 1922, being Section 315 (a).

It is the protestant's contention that such proclaimed duty by the President is illegal, and the right so to do, as provided in the above section, is void.

It is further stated in the protest that even if in form the act of the President has been done by constitutional delegation of legislative power and of the taxing power, it purports on its face to make a levy, not for raising public revenue, but under a declared policy for protection of American industries, based upon difference in cost of production at home and abroad, which is not a tax or duty within the meaning of the Federal Constitution.

[fol. 28] Without question, the Constitution of the United States confines all legislation to the Congress of the United States. The first article of the Constitution provides:

Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

It will not be questioned that if the act of the President, as provided in Section 315 (a) was and became a legislative act, then it is unconstitutional and void.

It was to remove the idea that an executive could legislate as had been customary prior to the adoption of our Constitution, that this section was adopted. Its importance was so great that it was the first provision to receive the serious thought of the Constitutional Convention.

As to what is legislation does not admit of doubt. Legislation is the act of the law-making power of a sovereign state. It is essentially an act of sovereign power. In ascertaining whether or not the proclamation of the President became the act of a sovereign power, we must keep constantly in mind what he did and the extent of the power entrusted to him. With what power was he invested, and was it legislative?

The act itself provides:

Sec. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing for-

eign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this act shown by said ascertained differences in such costs of production necessary to equalize the same. * * * Provided, That the total increase or decrease of [fol. 29] such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this act, or in any amendatory act.

At the time of the passage of the Tariff Act of 1922 of which the above section is a part, it was enacted that the duty on barium dioxide should be four cents per pound. In naming this rate Congress evidently did not ascertain the difference in the cost of production of this commodity in the United States and in the competing country. It evidently recognized the necessity of investigation. It therefore empowered the Chief Executive Officer of the United States to make such investigation, and if he found a difference in cost of production greater than the duty provided by the act, such duty should be increased to the extent of such difference not exceeding 50 per centum. Was that legislation? It seems to me it was not. The officer entrusted with this duty may have been the President of the United States; he may have been any other administrative officer. The medium through which the change in duty was to be determined did not depend on the one that made the investigation. It was the result that created the change.

The enactment of Section 315 (a) indicates that Congress was not satisfied as to whether the rate of duty provided in paragraph 12 was or was not satisfactory; therefore, it expressed its intent to have the duty fixed according to the difference between the cost of production in this country and that of the competing foreign country.

It will be observed we are dealing entirely with sub-section (a), and not with sub-section (b) of Section 315.

Sub-section (b) has reference solely to the American selling price.

Sub-section (c) states what the President should take into consideration in arriving at the cost of production,

namely, the difference in conditions, wages, cost of material, and other items entering into the cost of such or similar articles in the United States and in competing countries.

In his proclamation the President found the difference in the cost of production as provided in subsection (a).

As to whether or not Sub-section (b) of Section 315 is constitutional, is not involved in this hearing.

[fol. 30] In the exercise of the power granted to the President to investigate he could call to his assistance whatever means were needful to the ascertainment of the result. The law itelf provided that he could do so through the medium of the United States Tariff Commission, and his proclamation should not be issued until such investigation had been made.

He was not limited to an investigation by the Tariff Commission, although it was recognized this medium was the most available to ascertain the difference. It it was found there was a difference in the cost of production the moment this fact was ascertained, the proclaimed rate of duty took effect to the extent of this difference whether higher or lower than the rate prescribed by the paragraph. It did not require any act outside of the proclamation to place in effect this difference. The proclamation merely made known the result of his investigation. The investigation ascertained the difference in the cost of production. That difference may have been 10, 20, 30, 40 or 50 per cent. Whatever it may have been it instantly became the Act of Congress to that extent.

The ascertainment of this difference in the cost was not a delegation of a legislative power. It was not discretionary on the President's part, nor a matter of judgment.

This proclamation stated what he ascertained, as follows:

And whereas the President upon said investigation of said differences in costs of production of said article wholly or in part the growth or product of the United States and of the like or similar article wholly or in part the growth or product of competing foreign countries, has thereby found that the principal competing country is Germany and that the duty fixed in said title and act does not equalize the differences in costs of production in the United States and in said principal competing country, namely,

Germany, and has ascertained and determined the increased rate of duty necessary to equalize the same.

This does not indicate that the President exercised his judgment in fixing the rate or amount of duty. It is the mere ascertainment of the fact as to the difference, and his statement——

[fol. 31] An increase in said duty on barium dioxide (within the limit of total increase provided for in said act) from 4 cents per pound to 6 cents per pound.

indicates there was this difference between the cost of production in this country and the competing country, and thereby became the rate of duty as provided by law.

Under all the authorities it seems to me such fact finding conclusion cannot be legislation.

It must be kept constantly in mind that Congress in the exercise of its power did not transfer to the President a legislative right, but a right to ascertain a fact.

It is true, Congress could have made this investigation itself. Would any one for a moment contend that to do so would have been in the ordinary course of legislation? What period of time it took the President to ascertain this difference we do not know; nor the method or means he adopted. These are matters with which we are not interested. We cannot question the mode he pursued. We do know that a Congress that sought to make the cost of production of articles in this country as the basis of the rate of duty, would be in continuous session for years if it sought to ascertain such fact itself.

To provide for that contingency it entrusted this duty to the President, and gave him adequate power to ascertain this fact, and to call in bodies to assist him, one of which was the Tariff Commission.

This question as to the delegation of fact finding process and whether it is legislation has been many times before the courts, state as well as federal. The difficulties of the legislative body in ascertaining facts are set out in a very clear and comprehensive way by the Supreme Court of Minnesota in the case of State v. Ry. Co., 38 Minn. 281 N. W. 782:

* * * The maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry into which a court will not necessarily enter. Wayman v. Southard, 10 Wheat. (U. S.) 1, 46, 6 L. Ed. 253. The principle is repeatedly recognized by all courts that the Legislature may authorize others to do things which it might [fol. 32] properly but cannot conveniently or advantageously, do itself. All laws are carried into execution by officers appointed for the purpose; some with more, others with less, but all clothed with power sufficient for the efficient execution of the law. These powers often necessarily involve in a large degree the exercise of discretion and judgment even to the extent of investigating and determining the facts, and acting upon and in accordance with the facts as thus found. In fact, this must be so, if the Legislature is to be permitted effectually to exercise its constitutional powers. If this was not permissible, the wheels of government would often be blocked and the sovereign state find itself hopelessly entangled in the meshes of its own constitution. * * *

That authority clearly gives the reason and necessity of a fact finding body, and speaks in unequivocal terms of the inefficiency of a legislative body itself attempting to do what an administrative body could do in a more complete and less expensive way.

It is true, that cause was reversed by the Supreme Court of the United States (Railway Co. v. Minnesota, 134 U. S. 418), but it was not reversed on any of the grounds alleged with reference to the delegation of the finding of facts. In fact, the Supreme Court approved of the findings of the court below with reference to the acts of a commission to which it delegated the power to investigate. It was reversed on the ground that the Supreme Court of Minnesota, at a period of time in our national history when the railroad rate question was uppermost in the West, absorbing the thought of every one as to its proper solution, upheld a law that was confiscation of property within the due process clause of the constitution, and therefore its judgment was reversed.

There was not dissent on the ground it was a delegation of legislative power.

It was contended, as it is in the case at bar, that it was not constitutional for the Legislature of Minnesota to delegate to a commission the power to fix rates for transportation, and that so far as it attempted to thus confer authority it was void under the Constitution of the State of Minnesota.

[fol. 33] The opinion rendered by Justice Blatchford, referring to the decision of the Supreme Court of Minnesota, stated:

It then proceded to examine the question of the validity of the act under the Constitution of Minnesota, as to whether the Legislature was authorized to confer upon the Commission the powers given to the lattter by the statute. It held that, as the Legislature had the power itself to regulate charges by railroads, it could delegate to a commission the power of fixing such charges, and could make the judgment or determination of the commission as to what were reasonable charges final and conclusive.

Not a word in the opinion disapproved of that conclusion of the Minnesota court.

In a concurring opinion by Justice Miller, he stated:

The power which the Legislature has to do this can be exercised through a commission which it may authorize to act in the matter, such as the one appointed by the Legislature of Minnesota by the act now under consideration.

In a dissenting opinion Justice Bradley arrived at the same conclusion on the power to delegate authority, for he stated:

* * * I can see no good reason why it might not delegate the duty to a board of commissioners, charged, as the Board in this case was, to regulate and fix the charges, so as to be equal and reasonable. Such a board would have at its command all the means of getting at the truth and ascertaining the reasonableness of fares and freights, which a legislative committee has. It might, or it might not, swear witnesses and examine parties. Its duties being of an administrative character, it would have the widest scope for examination and inquiry. All means of knowledge and information would be at its command,—just as they would be at the command of the Legislature which created it.

Such a body, though not a court, is a proper tribunal for the duties imposed upon it.

[fol. 34] Thus we have the complete unity of the Supreme Court of the United States in holding that the Minnesota Legislature had the power to entrust to a commission the ascertainment of facts.

It will not be questioned by any one that the fixing of rates for the transportation of property is a legislative act, as much so as any tax provided for in the Constitution of the United States.

For a complete answer to the question as to whether Congress can delegate the right to ascertain a fact, and upon the ascertainment of such fact can entrust to the one thus ascertaining the duty of putting it into effect by proclamation, see Field v. Clark, 143 U. S. 649.

Keeping in mind the rule enunciated in the Clark case, supra, that the authority conferred upon the President to suspend by proclamation the free introduction of certain merchandise into the United States, when he is satisfied that any country producing such merchandise imposes duties or other exactions upon the agricultural or other products of the United States, which he may deem to be reciprocally unequal or unreasonable, is not open to the objection that it unconstitutionally transfers legislative power to the President,—we can then follow more clearly the holding of the court in subsequent decisions as to the effect of what is called legislative power.

A very clear expression as to this power is contained in Buttfield v. Stranahan, 192 U. S. 470, being an act with reference to the importation of unwholesome tea. It was there held that the act permittting standards to be established was not a delegation of legislative power. The act referred to in the opinion of the court was quite extensive, and considerable discretion was granted to the Board to ascertain whether or not the tea was wholesome. The court held that what the Board did was not legislation, but merely to ascertain the simple fact of the wholesomeness or unwholesomeness of an article imported into the United States for domestic use.

The court in its opinion deals very extensively with foreign commerce, and the plenary power that Congress possesses to legislate on this subject. Referring to the Clark case, supra, the court stated:

[fol. 35] We may say of the legislation in this case, as was said of the legislation considered in Field v. Clark, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

To deal in foreign commerce is not a natural right. All commerce may be excluded, and yet not a constitutional right invaded. This fact was first enunicated by Thomas Jefferson in his letters to the American ministers at London and Paris, while he was Secretary of State. Therefore, when we seek to levy a duty upon that which comes into the country, in a legislative way, there cannot be a complaint.

The same question arose in Union Bridge Company v. United States, 204 U. S., 364. In this case the question at issue was the power conferred upon the Secretary of War to ascertain whether or not bridges are of insufficient height or width of span, or are otherwise defective, so as to be unreasonable obstructions to navigation.

The law further provided it should be the duty of the Secretary, after giving reasonable notice to alter such bridge so as to render navigation reasonably free, specifying the changes as recommended by a body of civil engineers, if such obstructions were not removed, to refer the matter to the United States District Attorney for criminal prosecution.

The powers conferred upon the Secretary were great. He could almost destroy property, yet the court, speaking through Justice Harlan, referring again to the Clark case, supra, and the legislative history of this subject, stated:

It would seem too clear to admit of serious doubt that the statute under which the Secretary of War proceeded is in entire harmony with the principles announced in former cases. In no substantial, just sense does it confer upon that officer as the head of an Executive Department powers

[fol. 36] strictly legislative or judicial in their nature, or which must be exclusively exercised by Congress or by the courts. It has long been the policy of the Government to remove such unreasonable obstructions to the free navigation of the waterways of the United States as were caused by bridges maintained over them. That such an object was of common interest and within the competency of Congress, under its power to regulate commerce, everyone must admit; for commerce comprehends navigation, and therefore to free navigation from unreasonable obstructions is a legitimate exertion of that power. Gibbons v. Ogden, 9 Wheat. 1, 189, 190. As appropriate to the object to be accomplished, as a means to an end within the power of the National Government, Congress, in execution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the waterways of the United States, were unreasonable obstructions to free navigation. Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interest which require National Legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of [fol. 37] enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense,

exert legislative or judicial power. He could not be said to exercise strictly legislative or judicial power any more, for instance, than it could be said that Executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under the general rules prescribed by Congress, are entitled to pensions. If the principle for which the defendant contends received our approval the conclusion could not be avoided that Executive officers, in all the Departments, in carrying out the will of Congress, as expressed in statutes enacted by it, have from the foundation of the National Government, exercised and are now exercising powers, as to mere details, that are strictly legislative or judicial in their nature.

This is very ample authority on the question, and follows the rule in the Minnesota case that these matters of detail in ascertaining a fact, may be entrusted to commissions or executive officers for the carrying out of the will of the Legislature.

Congress passed in 1893 what is known as "The Safety Appliance Act" and entrusted to the American Railway Association and the Interstate Commerce Commission the duty of designating and promulgating the standard height and maximum variation of drawbars for freight cars. It was contended that this act was unconstitutional, as a delegation of the legislative power, not permitted by the Constitution.

The Supreme Court of the United States in St. Louis, Iron Mountain and Southern Railway Company v. Taylor, administratrix, 210 U. S., 281, held that this act was constitutional.

The law is set out in the opinion, and it enumerates minutely that the American Railway Association is authorized to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars measured perpendicularly from the level of the top of the rails to the centers of the drawbars, for each of the several gauges of rail- [fol. 38] roads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars; that upon their determination being certified to the Interstate Commerce Commission, the Commission shall at once

give notice of the standard fixed upon to all common carriers by such means as the Commission may deem proper.

It then further provided that, should the association fail to determine a standard, the Interstate Commerce Commission had the power.

It will be observed that two parties were here designated to ascertain the facts, first, the American Railway Association, and, second, the Interstate Commerce Commission, to whom the American Railway Association was to report.

The Commission issued its order, as provided, as the result of the investigation, giving minutely the height of the drawbars, measuring even to inches, the maximum variation permitted.

With reference to its constitutionality the court stated:

It is contended that there is here an unconstitutional delegation of legislative power to the Railway Association and to the Interstate Commerce Commission. This is clearly a Federal question. Briefly stated, the statute enacted that after a date named only cars with drawbars of uniform height should be used in interstate commerce, and that the standard should be fixed by the Association and declared by the Commission. Nothing need be said upon this question except that it was settled adversely to the contention of the plaintiff in error in Buttfield v. Stranahan, 192 U. S., 470, a case which in principle is completely in point. And see Union Bridge Co. v. United States, 204 U. S., 364, where the cases were reviewed.

We can well apply that rule to the issue in the case at bar. The President only carried out the intention of Congress as to the cost of production, and having found it he was empowered to proclaim the result of that finding. Such act was not a delegation of legislative power.

A very exhaustive discussion of many of these questions is contained in Interstate Commerce Commission v. Goodrich Transit Company, 224 U. S., 194. That case had refer-
[fol. 39] ence not only to the power of the Commission to fix a rate, but required railroad and other interstate companies to keep their accounts in a certain way, leaving it to the Commission to provide the manner and method in which these accounts should be kept. As to Section 20 of this act the opinion states:

Congress, in Section 20, has authorized the Commission to inquire as to the business which the carrier does and to require the keeping of uniform accounts, in order that the Commission may know just how the business is carried on, with a view to regulating that which is confessedly within it power.

With reference to the delegation of legislative power the court states:

Furthermore, it is said that such construction of Section 20 makes it an unlawful delegation of legislative power to the Commission. We cannot agree to this contention. The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress. This rule has been frequently stated and illustrated in recent cases in this court, and needs no amplification here. Buttfield v. Stranahan, 192 U. S., 470; Union Bridge Co. v. United States, 204 U. S., 384; United States v. Grimaud, 220 U. S., 506.

In Section 20, Congress has authorized the Commission to require annual reports. The act itself prescribed in detail what those reports shall contain. The Commission is permitted, in its discretion, to require a uniform system of accounting, and to prohibit other methods of accounting than those which the Commission may prescribe. In other words, Congress has laid down general rules for the guidance of the Commission, leaving to it merely the carrying out of details in the exercise of the power so conferred. This, we think, is not a delegation of legislative authority.

[fol. 40] This permission to require a uniform system of accounting, and the power conferred on the Commission, are much more discretionary than the power conferred upon the President to ascertain cost of production.

In Ocean Steam Navigation Co. v. Stranaham, 214 U. S., 320, the court was dealing with the admission of aliens into the United States, and to confiding the enforcement of the law in regard thereto to administrative officers.

The law empowered the Secretary of Commerce and Labor to exercise very extensive powers with reference to the introduction into the United States of aliens afflicted with a loathsome or dangerous contagious disease. The law is contained in Section 9 of the Alien Immigration Act of March 3, 1903, and enters minutely into powers that seem discretionary on the part of the Secretary of Commerce and Labor as to the ascertainment of the facts with reference to the existence of disease, and his right to use competent medical examiners, and exercise an authority over transportation companies and railways to prevent the introduction of such aliens into the country, and entrusting to executive and administrative officers a very extensive power to carry into effect the legislation of Congress.

This is an exhaustive opinion on the subject, and cites many cases approving of the doctrine that it is not a grant of legislative power to an individual or association to ascertain the facts with reference to the matters on which Congress had legislated and then carrying into effect that which is ascertained.

The power given to the Interstate Commerce Commission to make railroad rates, is certainly analogous to the question at bar.

The rate for the carriage of a ton of freight or of a passenger is surrounded by so many circumstances and facts that it would be wholly inadvisable to legislate directly thereon. So many factors, leading to what would be reasonable compensation upon the investment, enter therein, that it is practically impossible for a legislative body itself to ascertain this compensatory rate. It therefore provided that a body known as the Interstate Commerce Commission, should ascertain all the different factors that enter into a compensatory rate, and having ascertained such fact they were empowered to name the rate for the moving of such traffic.

[fol. 41] Its power to name a rate is well within the provisions of the section of the Constitution of the United States which provides that Congress shall have the power to regulate commerce with foreign countries, and among the several states and Indian tribes.

Under that provision Congress had the right to empower a body to carry out the details of the legislation that was enacted.

2nd. It necessarily follows, that by the section above quoted, Congress possesses ample and complete power over foreign commerce, and may, in the exercise of the right thus conferred, place such tax upon the introduction of foreign comerce as to practically prohibit its entrance. That is a political question, and not judicial. With the policy of such an enactment the courts are not interested. The question the court must pass on it whether or not, in the exercise of this right, it has done so within the power granted to it by the Constitution of the United States.

3d. It is claimed the difference between the cost of production of the domestic article and a like one in the foreign country, can not be determined with accuracy; that so many factors enter therein as to the same article produced in different parts of the same country, as to preclude a finding that is just and fair. This may be true, yet it does not sustain the proposition that the legislation is void. In determining this question, factors may be introduced that are misleading and without significance, and it may be that opinion and prejudice will enter thereon. That is a matter of administration, and does not affect the constitutionality of the act. The finite mind may be unable to establish a fact with mathematical precision. If in ascertaining the cost of producing an article in this country and a like one in a foreign country, where judgment must depend upon conclusions as to the probative effect of many factors, as to which minds may differ, inconsistencies arise, yet this does not necessarily result in an impairment of the legislation. It indicates the inability of the finite mind to arive at an accurate result.

As to whether or not this legislation is feasible cannot affect the question of its constitutionality. It is practicable, with a fair degree of accuracy, to ascertain the cost of pro- [fol. 42] ducing a bushel of grain, a ton of steel, or a ton of sugar. In doing so resort is had to the cost of labor, material, interest on the investment, and other conditions that arise with reference to producing such article.

All these questions enter into the administration of the statute, and are not valid constitutional objections to such legislation.

In arriving at a solution as to the constitutionality of the law the policy of the legislation is not involved, however

injudicious it may be, nor how much its construction by administrative bodies may be abused.

Congress is presumed to legislate within the provisions of the Constitution. It is the duty of the court, in construing such legislation, to ascertain whether it acted within its constitutional limitations.

The administration of an act is the province of an entirely separte body, and the court is powerless to offer advice thereon.

4th. It must be kept constantly in mind that the Congress of the United States declared in its passage of Section 315,—

That in order to regulate the foreign commerce of the United States and *to put into force and effect the policy of the Congress by this act intended*, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or pr-duct of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said defferences in costs of production * * * he shall, by such investigation, ascertain said differences and determine and proclaim the changes * * *.

(Italics ours.)

This statute clearly announces the policy of the Congress that the rate of duty on imporated merchandise shall be the difference in the cost of production of similar articles in the United States and those of the competing foreign country. With that in mind, it is evident to every thinking individual it would be impossible for the Congress of [fol. 43] the United States itself to give the time to ascertain such differences.

The details of investigation must be undertaken by a commission or executive officer with ample authority to ascertain the facts. How appropriate are the words of the Supreme Court of Minnesota in State v. Railway, supra:

* * * These powers often necessarily involve in a large degree the exercise of discretion and judgment even to the extent of investigating and determining the facts,

and acting upon and in accordance with the facts as thus found. In fact, this must be so, if the legislature is to be permitted effectually to exercise its constitutional powers. If this was not permissible, the wheels of government would often be blocked and the sovereign state find itself hopelessly entangled in the meshes of its own constitution.

This statement is so true it cannot be enlarged. The ascertainment of a fact, embodying as it does some discretion or judgment as to the conclusion, does not arise to the dignity of legislation. Not to permit such fact-finding bodies, would, as the court said, block the wheels of government, and the sovereign state would find itself "hopelessly entangled in the meshes of its own constitution."

Admittedly commerce and trade are the life blood of a nation, and penalties placed thereon may lead to the lessening of influence and prosperity. This is a political question on which men have differed from the foundation of the Government; some advocating a free commercial relationship with all people and others denying such right. That the Constitution gave to the legislative body of our country full power to regulate commerce with foreign countries is unquestioned. Frequently has an embargo been placed upon foreign products by reason of conditions that were discriminatory against our commerce. It may not be a just policy to prevent the importation of foreign products, but the right to do so is unquestioned.

It therefore reasonably follows that the term "regulate" would empower the Congress of the United States to commit to a body, such as the Tariff Commission, any executive officer, or the President of the United States, the right to ascertain the differences in the cost of production, and when [fol. 44] his ultimate judgment was proclaimed it became the act of Congress of the United States with reference to the duty on the article under investigation.

It did not require any act on his part, except to proclaim his finding. His finding of the difference ipso facto became the law of Congress, as though it had provided such rate at the time of the enactment of paragraph 12.

If therefore follows that Section 315 (a) is constitutional. As this question is controlling the protest should be overruled.

Jerry B. Sullivan, U. S. General Appraiser.

BEFORE BOARD OF U. S. GENERAL APPRAISERS

DISSENTING OPINION

BROWN, General Appraiser:

This suit against the United States was brought in this court under the legal procedure provided by the customs acts. The collector took duty at the rate of 6 cents per pound upon certain barium dioxide by virtue of a Presidential Proclamation of May 19, 1924 (T. D. 40216, 45 Treasury Decision 669) increasing the rate 50 per centum under the authority of subdivisions (a) and (c) of Section 315, Title III, Tariff Act of September 21, 1922.

The inmporter claims that only the rate of 4 cents per pound prescribed by paragraph 12, under which classification is made, should have been collected; asking judgment for refund of all duty taken above that rate.

Testing the legality of a customs levy (necessarily including its constitutionality) is the purpose for which this jurisdiction was expressly established, as an improvement upon, and substitute for, the original common law remedy (U. S. v. Ranlett, etc., 172 U. S. bottom of page 145; U. S. v. Passavant 169 U. S. top of page 20).

The language of the present protest section (section 514, Act of 1922), permitting a legal contest (and full nisi prius trial before this Board as the court of first instance, United States v. Macy, 13 Ct. Cust. Appls., decided Nov. 21st 1925), of all decisions of the collector, affecting the rate and amount of duty, is very broad and expressly includes [fol. 45] the "legality of all orders and findings entering into the same." Moreover, the appeal provision Section 195 of the Judicial Code provides that certiorari to the United States Court of Customs Appeals, whose duties are appellate only, may be granted by the Supreme Court, without certificate of importance, in customs cases involving constitutional questions. The case of Field v. Clark, 143 U. S. 649, arose before this tribunal as reported in G. A. 203, T. D. 10553.

Section 315 of Title III of the Tariff Act of 1922 which purports to authorize such increase, so far as material, reads as follows:

(a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States * * * ; Provided, that the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in costs of pro- [fol. 46] duction of articles provided for in Title I of this Act, whole or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this act do not equalize said differences, and shall further find it thereby shown that the said differences in costs of production in the United States and the principal competing country can not be equalized by proceeding under the provisions of sub-division (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and

upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in sub-division (f) of Section 402 of this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under sub-division (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States * * *.

(c) That in ascertaining the differences in costs of production, under the privisions of sub-divisions (a) and (b) of this section, the President, in so far as he finds it prac- [fol. 47] ticable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production, of such similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give

reasonable opportunity to parties interested to be present, to produce evidence and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provisions of this section upon such articles shall exceed the maximum ad valorem rate so specified.

The Federal Constitution, Article 1, Section 1, reads:

All legislative power herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

[fol. 48] Article 1, Section 8, paragraph 1, reads:

The Congress shall have power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States, but all duties, imposts and excises shall be uniform throughout the United States.

The Supreme Court has repeatedly recognized inherent limitations upon the federal taxing power growing out of the separation of governmental powers and the necessary implications arising therefrom. Evans v. Gore, 253 U. S. 245; Collector v. Day, 11 Wall. 113; United States v. R. R. Co., 17 Wall. 332; Child Labor Tax case, 259 U. S. 20; Hill v. Wallace, 259 U. S. 44.

The maxim of our law first enunciated by Marshall, that the power to tax is the power to destroy, is not an admonition to the courts to assume that every tax passed by the Legislature is valid, but an admonition to scrutinize care-

fully whether the power exists, because of the realization that, if it exists, it may be used to the extent of destruction.

The power here sought to be granted is a very broad power. It is much broader than the power to find and declare discrimination by a foreign country against our commerce and thus put into force maximum tariff rates already written by the Legislature as in Field v. Clark.

It is power to find and declare the increase or decrease of an existing tariff duty, necessary to equalize the difference in production costs at home and abroad to the extent of 50 per centum, or if (in the case of ad valorem rates) an increase of 50 per centum in the rate is insufficient to meet such difference, to change an existing ad valorem to the American selling price of a "similar competitive" domestic article produced in the United States which, when used in substantially the same manner, produces substantially equal results as the imported article on which the tax is laid, though perhaps differing in structure and competition therefrom. Note the action taken upon diethylbarbituric acid under sub-section (b) in T. D 40474, 46 Treas. Dec. 352, and Tariff Commission's printed report thereon, where among two competing domestic articles the American selling price of a particular one is selected as the American valuation to be applied. Note also the in-[fol. 49] crease of duty on taximeters by the change on Dec. 12, 1925 (T. D. 41226) to the American valuation while lowering the ad valorem rate from 45 to 27.1 per centum.

The declared policy of the act differs from a strict rule based on the difference between foreign and domestic production costs whenever the 50 per centum limit prevents such equalization as to specific rates, i. e., rates at so much per pound, per bushel, per square yard, or other quantity.

Again, such difference in policy appears in the power to change the basis of assessment of an ad valorem duty. The shift to the American selling price measure of duty increases the amount of duty paid, in one step, from the measure by the foreign ad valorem. This could only be adjusted to a found difference in production costs, by, at the same time, lowering the existing ad valorem rate. The latter reduction can only be made to the extent of 50 per centum as provided by the last paragraph of subdivision (b) of Section 315. Consequently, if more than 50 per cen-

tum reduction in the existing rate should be required to make the new amount of duty to be paid, by reason of the changed ad valorem, fit the found cost of production difference; such equalization could not be made.

Thus the power to increase the amount of duty paid is much greater in the case of ad valorem rates than in the case of specific rates while the power to decrease is the same for both. Again, ad valorem rates may be decreased by only 50 per centum. But by changing the ad valorem basis the amount of duty paid may be increased to an amount varying for each article imported according to the price here of its particular American competitor and running perhaps to several hundred per centum.

This possible change to this new measure for ad valorem duty (as a method of increasing the actual tax paid), coupled with the 50 per centum limit upon changing the rate of duty, thus greatly adds to the complications and difficulties of the plan.

Moreover, it should be noted that subdivision (c) of Section 315, provides that:

> In ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, [fol. 50] shall take into consideration * * * (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States * * * and (4) any other advantages or disadvantages in competition.

The relation of these two considerations to determining the difference in production costs is not apparent.

These portions of subdivision (c), just quoted, were deliberately retained as they now read, after the power given to the President to change rates to equalize "conditions of competition" had been amended to equalize "costs of production." (Senate debate, Cong. Record, Vol. 62, Part 11, pages 11226 to 11229, of Aug. 11, 1922), Senator Walsh of Montana moved to strike out all of subdivision (c) down to and including the word "competition." His amendment was rejected. He said (page 11228):

> I do that, because according to my understanding, that is entirely inconsistent with the amendments heretofore

adopted declaring the difference in the cost of production to be the basis for fixing the rates by the President.

Senator Jones, of New Mexico, had previously said, page 11227:

> Is that the certain and fixed basis which the Senator from Wisconsin intended to establish as the one which must be used by the President in fixing rates? Did not the Senator from Wisconsin earnestly urge that the act would be unconstitutional unless we had a certain mathematical measure, unless it were made definite and certain? But the provision, as pointed out by the Senator from Montana, destroys the very certainty for which the Senator from Wisconsin pleaded.

Such is the provision, with these necessary complications and implications which is under attack, the constitutionality of which must be determined in this case.

So far, it has been assumed that the difference in cost of production at home and abroad can, with expert advice, be accurately ascertained and a duty fixed to equalize such difference.

[fol. 51] However, in his little book entitled "Making the Tariff in the United States" (1924), published by the Institute of Economics (McGraw-Hill Book Co., New York), Thomas Walker Page (a former chairman of the Tariff Commission), has demonstrated that it is impossible to calculate with accuracy the difference in cost of production at home and abroad. He devotes Chapter IV, entitled "Tariff Making by Formula," to a demonstration of this. His illustrations, pages 85 to 87, of attempts to separate the domestic cost of production of raising mutton from that of raising wool on the same sheep, and his illustrations, pages 88 to 90 of impossible attempts to separate the cost of incidental by-products, are conclusive and convincing. They show that the result must always largely depend upon the point of view and the method of bookkeeping or calculating employed by the person who attempts it. Among other things, he says, page 83:

> The application of the difference between costs as a measure of duties is usually impossible owing to the difficulty of finding what the difference amounts to.

There is much misunderstanding as to what cost accounting can really show. It is true that no manager of any considerable and well-conducted business today fails to record the costs of the business and to make some analysis of them. He finds it desirable to do so in order to stop leaks, to promote efficiency, to exhibit the net profits of the enterprise, and for other purposes. There is a popular assumption that the records thus kept will accurately disclose the cost per unit of the products turned out. In fact, however, this is seldom the case.

Page 84:

A multitude of questions arise * * * Shall the materials used be valued at their market price, or at what it actually cost to produce them? Shall interest be allowed on the value of plant and equipment; and if so, is it proper to take the value of the plant as a "going concern," or is it better to take as the value for estimating cost the outlay of the owners in acquiring and improving it? Such questions suggest that costs can be made to seem either high or low by the system of accounting which is followed. It [fol. 52] might be possible in time to standardize the system and thus in a somewhat arbitrary way to reach a cost per unit of product in some industries that consist of simple and independent processes resulting in a single product. But such industries are relatively few. Modern industrial processes are commonly so organized and integrated that they contribute jointly to the completion of a number of different commodities. The accountant is usually faced therefore, with the problem of joint costs, and the solutions accepted are purely arbitrary and differ widely from one plant to another.

Even in a simple pastoral industry, such as sheep husbandry, this problem is encountered * * * aside from any question as to how the total cost is constituted what is the basis on which it can be divided between the wool and the meat produced? The existing tariff law imposes duties at different rates on sheep, on mutton, on lamb, and on several varieties of wool. If these duties are to be measured by the difference between domestic and foreign costs, the total cost of sheep husbandry must in some way be dis-

tributed amongst the different products on which the duties are levied.

The basis of distribution adopted by the Tariff Commission is doubtless as good as any. Thus the commission reported that in Montana during 1919 the expenses for 821,222 sheep were $9.93 a head. This was made up of labor, interest at 6 per cent on investment, feed, fees and rentals, shearing, depreciation and miscellaneous. It is clear that no important item except shearing was incurred exclusively for a single product. Expenditures for labor, feed, and the rest were made for producing both meat and wool. The commission divided the joint costs between these two products in proportion to the sheep-owners' receipts from each of them. * * * The fallacy of the method is obvious since it makes it appear that the smaller the receipts from either product the lower will its cost be. This is clearly contrary to fact.

He then proceeds to show that a very hard winter for lambs, requiring unusual outlays to save any lambs at all, would reduce he proportionate receipts from lambs and in- [fol. 53] dicate, erroneously, of course, that the cost of lambs was exceptionally low, and that of the wool proportionately high, adding

and by a pernicious paradox if the lamb crop were a total failure the lambs would have cost nothing at all.

After further equally convincing illustrations his conclusion, on page 92, is as follows:

These illustrations suffice to show that variation in costs of production is general, that it can not be compensated by any method of bookkeeping, and that it can not be prevented by any device of human ingenuity.

Adding:

There is, in fact, no such thing as a single "domestic cost of production" for any commodity. There are almost as many different costs as there are producers; and the question arises: Which should be taken for comparison with a foreign cost to find a standard for measuring duties? It is obvious that the higher the figure taken the greater will be the proportion of the industry protected. But no

one would advocate duties high enough to protect producers whose high costs are due to unwise location, inadequate equipment, extravagant methods, or poor management. On the other hand, if the lowest cost be taken it might well result in no duty at all, for the lowest domestic costs are some times less than the lowest costs abroad.

After reviewing the difficulties in obtaining foreign costs he concludes, Chapter IV, with this general statement:

The conclusion can not be escaped that it is rarely possible to ascertain accurately the difference in costs of production at home and abroad. To use as the basis of a general tariff act of thing so fleeting, evasive, and shadowy would be neither right nor possible.

Philip G. Wright, in the Review of Reviews for November 1922, page 502, says:

In many cases, the collection of costs is impossible for the simple reason that they do not exist. What, for exam- [fol. 54] ple, is the cost of producing wool as distinguished from mutton, of hides as distinguished from beef, of gasoline as distinguished from kerosene, lubricating oil, and a dozen other petroleum products? Where costs can be ascertained it is found that no two manufacturers manufacture at the same cost, and the problem of selection arises. Shall it be the highest or lowest, the average or marginal that is to be used for determining the duty? Wages and prices of materials are extremely uncertain guides. In the case of twenty-nine sugar centrals in Cuba, all having the same opportunities for obtaining labor and materials, the highest unit cost was more than twice the lowest, with the costs for the other twenty-seven ranging in gradation between.

Grand*i*ng Page's demonstration that the difference in cost of production, of most articles of commerce, at home and abroad is not an ascertainable fact in any reasonable sense attributable to those words, and the legal conclusion inevitably follows that the provision before us leaves to executive judgment and discretion what the amount of the tax shall be. The executive officers then (taking the whole process together, including the function performed by Tariff Commission and President, and whoever else is con-

sulted), make the law levying the tax, instead of the elected representatives of the people to whim alone such power is committed by the Constitution.

Irrespective of what Page so brilliantly says, we all know from common knowledge that the actual cost of production in no two factories for farms is the same. This is due to differences of location, cost of plant, labor conditions, quality of executive management, method of capitalization, availability and cost of raw material, whether the article is produced directly or with other things as a by-product, distance from the market, weather and climatic conditions, and other causes.

A careful study of the Tariff Commission's elaborate, careful, and painstaking published reports under Section 315, particularly their reports upon "Wheat and Wheat Products," and "Sodium Nitrite" indicate that there are many methods of calculating and averaging which they must choose between in getting the result aimed at. Their discretion in so deciding is necessarily bound, at times, to [fol. 55] affect their conclusion as to what is the actul difference between foreign and domestic costs, for instance.

(1) What area (if not the whole United States), they shall cover to compare with the competing Canadian section in the production of say, hard spring wheat, and whether winter wheat shall be included in the investigation; the tariff rate applying to all wheat?

(2) Whether costs of one current year should be compared or an average over a period of years, say three, taken for comparison.

(3) Whether transportation costs of the foreign and domestic articles to a common market place should be included or excluded from costs of production.

(Note.—If transportation costs to a common market place can be considered, which shall be chosen as between the differing cost of transporting goods, say to a common market in New York, from producers located in Texas, California, Michigan and Maine. Any attempt at averaging these would necessarily be arbitrary and plainly lie in discretion. No averaging would satisfy the long haul producer. If there happens to be more than one common mar-

ket place the difficulty, uncertainty and hence the discretion increases.)

(4) Whether the difference between foreign and domestic costs should be measured between points representing a weighted average cost in the two countries respectively; or at a point representing a cost at or below which the bulk of the American product is produced.

(5) Whether land in the competitive area investigated to determine an agricultural duty should be taken at its rental value or as for a fair return at interest upon its capital value.

(6) What division of costs shall be apportioned between principal and by-products, shown by Page as above, to be necessarily arbitrary.

(7) The readjustment vel non of actual costs to an estimated production equivalent to a given percentage of plant capacity.

[fol. 56] In this connection note "Statement Regarding Mill Feed Costs" by Thomas O. Marvin, chairman of the Tariff Commission, p. 26 of the Commission's Report on "Wheat and Wheat Products," in which, among other things, he says:

* * * the experts of the commission were compelled to prepare an *estimated* or *theoretical cost* based upon a system of allocating a percentage of milling costs in the proportion which *receipts* for mill feed bore to *receipts* for flour. (Italics ours.)

The result of any attempt to choose any method or rule whatsoever for averaging the costs of many different producers whether based upon "a weighted average cost" or upon a "bulk line production cost" or upon any other so-called scientific method, necessarily becomes a mere discretionary guess, i. e., a question of where we choose to draw the line. The final figure arrived at manifestly must depend upon the particular method of averaging which is selected. A method does not become accurate, and its result become certain, by merely giving the process a scientific name. A dream does not become a reality through

descriptive terminology. A guess does not become a fact by calling it a finding.

Selling prices and cost of production are not certainly related to each other. Costs may increase, diminishing profit, without a corresponding higher selling price being necessarily obtainable for the goods. Conversely costs may diminish without sales prices declining proportionately. Consequently assuming the difference in production costs of a particular article at a particular time was mathematically determinable, and an ad valorem rate was proportionally increased, or diminished, to equalize such cost difference; any change in foreign sales prices would at once vary the amount of duty paid and to that extent spoil the equalization between duty and cost difference. As, in ordinary trade, no sales prices long remain constant, and costs of production also continually vary, the impossibility of fixing an ad valorem tariff which would, for any reasonable period of time, accurately represent the difference in cost of production at home and abroad becomes apparent.

Any generalization from such varying factors however intelligently and painstakingly arrived at by executive au- [fol. 57] thority must, in the nature of the case, be largely a matter of individual opinion and judgment. As all the factors which make up the finding are themselves variable and uncertain it is impossible that the generalization from them could attain to greater certainty or be any more than a rough approximation like the finding of damages, in tort, by a jury.

In an address on December 9, 1925, before the American Economic Association published in the Congressional Record of January 4, 1926, page 1051, Dr. F. W. Taussig of Harvard (another former chairman of the Tariff Commission), says:

The point which is important for my present argument is that any decision which is finally reached—any figure which purports to state the differences in cost—necessarily involves the exercise of judgment. No exact and certain conclusion can be reached even by the most perfectly conducted investigation. There is always the possibility of choice between different results, according as you select one or another method of averaging, cover one or an-

other period of time, put your marginal produce of your bulk line at a higher or lower point, consider this figure or that to be the representative one. Even the most competent and impartial Tariff Commissioner will often have to confess that there is no one figure which can be unqualifiedly said to be the accurate one.

Professor Willoughby, in his work on the Constitution, vol. 2, page 1319, in discussing Field v. Clark, says:

The doctrine thus declared is without objection so long as the facts which are to determine the executive acts are such as may be precisely stated by the Legislature and certainly ascertained by the executive.

Were it possible to use the term "precisely stated" in connection with the language of Section 315 it has been fully demonstrated above that the difference in cost of production at home and abroad can not be "certainly ascertained."

[fol. 58] No amount of administrative findings by the most brilliant and painstaking Tariff Commission (which their published reports under Section 315 show the commission to be) can render certain a legislative rule, declaring a policy for the future, which depends upon such factors inevitably fluctuating from day to day. Nothing can be made certain which inherently involves uncertainty.

A commission of experts working at top speed every day of the year, could cover during many years but a small fraction of the rates in the dutiable schedule. Thus, at best, the declared policy of Congress could have only a limited application. Moreover, by the time a necessarily long and elaborate investigation has been concluded conditions may have materially changed. It would ex necessitate rest in the judgment and discretion of the commission, without whose investigation the President can not act (or from the suggestion of the President himself) or the accident of what petitions for changes happened to be filed, as to how far and to what extent the declared policy should be carried out. This itself makes Section 315 speak and operate in terms of executive judgment and discretion.

There is nothing in these provisions to limit the President in making the findings provided for (and the consequent changes in duty) to the report of the Tariff Com-

mission thereon. Manifestly he can also consult data and information furnished him by other experts or departments. This again speaks in terms of discretion.

The constitutional consequences as a precedent from holding this to be a valid delegation of power must be squarely met.

If Congress may direct the executive authority to change existing tariff rates to meet differences in production costs while considering also differences in the sales prices in America of the foreign and domestic articles and "any other advantage or disadvantages in competition," it follows as a logical conclusion that similar action can be taken in relation to income taxes or inheritance taxes, or any other taxes. If this rule of supposed efficiency, or equalization of competition through cost calculations is constitutional, Congress could declare some rule of supposed economic morality for income and inheritance taxes that everyone should pay according to his ability, with authority to the executive to find the facts and establish the classes [fol. 59] or groups upon which, in conformity with such declared rule, income surtaxes or graduated inheritance taxes should be levied, in the amounts as, and upon the classes of persons who) were fixed and determined by the executive, relying upon the best expert economic advice. The supposed facts to be found by the experts would be as easy to find as the supposed facts to be found under this plan. One would no more be a conjecture or guess than the other. What are the rational limits to the new constitutional doctrine here asserted in this statute? All candid men must admit that there are none.

To affirm the assessment before us would open a door into a land which has no boundary and totally obliterate the distinction between legislative and executive powers, and their separation for the protection of liberty, upon which our constitutional structure rests and set up in its place a new executive power under which the citizen is taxed at discretion.

We use the word "fact" in a number of senses. When a jury awards damages for a tort committed, it merely makes a rough guess frequently including punitive damages, i. e., what it considers, as a purely mental operation, outside of any calculation for actual loss, should be added as punish-

ment for the wrong. Reasonable minds will always differ as to whether such verdict (with or without punitive or "mental anguish" additions) accurately compensate the plaintiff for the injury suffered. Neverthless (in both cases) for want of a better term and in poverty of language, we call that "finding a fact" in a legal sense, because the jury rather than the legal functionary, the court, determines it.

It is not the finding of a "fact" in any accurate sense of that term, which Webster calls "a reality," an "event," a "truth." It is a mere attempt to guess at an adjustment which will be accepted as an approximate satisfaction for some faulty human relationship. Such legal process, for rough approximations of this sort, is all that the human mind can devise in aid of bringing about justice between the parties to such litigation.

But here we are not dealing with litigation or with something which can be determined by the processes of litigation. We are dealing with the purely political matter of the levy of a tax upon the citizen by the legislative department [fol. 60] of his Government. This is a political process by which the citizen, acting through his federal legislative agents in Congress, fixes the necessary contributions for the support of the Federal Government. There are no parties whose maladjusted relations are to be approximately adjusted through a legal remedy given. No one has a right to the continuance or imposition of a particular tariff rate. The question before the executive authority under Section 315 is not the assertion or protection of a right, but whether the existing law shall be changed.

It is difficult for either a legal or lay mind to mentally contemplate a suit by a citizen against his Government, or against importers, manufacturers, consumers, or anybody else, brought to determine the amount of a tax to be levied by Government, upon himself or upon any other citizen or class of citizens. It is equally difficult to visualize a court, or a quasi-judicial body with review by the courts, performing a purely legislative function and entering purely legislative judgments and decrees, for the levy vel non of such tax, which the determination of such fanciful suit would involve. It must be said, without hesitation, by all who understand what the American Government, with

its vital separation of legislative, executive and judicial powers, means, that if this act intends to set up such a legalistic unreality as that, it must necessarily fall by its own weight as attempting to make justifiable (with consequent power to the courts to determine it) the purely political act of levying a tax.

We have seen that the finding of damages for a tort by a jury is not accurately described as the finding of a "fact" in the ordinary sense of that word.

On the other hand, when the Secretary of the Treasury measures the number of grains of silver or gold in a foreign coin (as in Arthur v. Richards, 90 U. S. 259; Cramer v. Arthur, 102 U. S. 612; Hadden v. Merritt, 115 U. S. 25, and United States v. Klingenberg, 153 U. S. 93), he determines something about which ordinary minds can not reasonably differ. That is the determination of a fact in the accurate sence.

The amount of a bounty or grant as given on export by a foreign country as measured by the Secretary of the Treasury for the assessment of countervailing duty is [fol. 61] equally definite and certain (see Downs v. United States, 187 U. S. 496, and Nicholas v. United States, 249 U. S. 34).

Again, when Congress leaves it to the Secretary of War to determine whether or not a bridge over a navigable river obstructs navigation that officer merely measures the height of vessels actually using, or capable of using, that stream and by comparing the height of the span of the bridge ascertains whether or not there is such obstruction. That again is the real determination of a fact, concerning which there could not be an honest difference of opinion. That is all that is decided in the cases of the Union Bridge Co. v. United States, 205 U. S. 364; Monongahela Bridge Co. v. United States, 216 U. S. 177, and Hannibal Bridge Co. v. United States, 221 U. S. 194.

Determination of the easily ascertainable fact of discrimination by a foreign country against our commerce as a condition of the application of maximum tariff rates, already written in the statute, as in Field v. Clark, 143 U. S. 649, falls into the same definite class.

It is to this class of definite "facts," to which the courts refer, when they say that the Legislature may delegate the

finding of a fact to executive authority, upon which finding the operation of a statute, already complete in itself, may be made to depend.

Here the insuperable and inherent difficulty, in accurately determining and accurately comparing foreign and domestic production costs, makes the action before us fall into the uncertain and conjectural nature of the other class. Add to that (1) consideration of relative sales prices of the foreign and domestic article in our market and (2) consideration of "other advantages and disadvantages in competition" and the uncertainty and indefiniteness enormously increases and makes sure the conclusion that it falls into that class.

To deny the power asserted in the case at bar would most emphatically not stop the wheels of Government, as was said by the Supreme Court, in the Union Bridge Co. case, supra, concerning the denial of the power to prevent the obstruction of navigation through the action of the Secretary of War there discussed. Its denial here would not hamper in the slightest degree the customary levy of tariff duties by Congress. It would merely strike down an [fol. 62] unwarranted delegation of the taxing power never heretofore attempted.

The claim that finding market value on the day of exportation by appraisement, by way of executing and applying an existing ad valorem rate, a relatively certain and accurate process, which is subject to judicial review before the Board, and the courts on appeal, as to the law involved, and before the Board (a nisi prius court) as to the facts, bears any resemblance whatever to, or serves as any sort of legal precedent for the political levy of new tariff taxes upon the citizen, (l. c., prescribing a tax rate for the future) by means of the complicated formula before us, is so untenable on its face as to merit no discussion.

For those to whom the distinction between executing or applying an existing ad valorem and making a new rate of tax (to apply in the future) by changing the law is not self-evident it may be noted, that: in the rare cases where under former acts, in the absence of sales or offers to sell foreign market value on the day of exportation was arbitrarily found constructively from cost of production, with fixed minimum additions for overhead and profit, merely

the cost in one factory on a day certain was in practice dealt with.

The words "such or similar" never appeared in the cost of production provision used for finding ad valorem value as a dernier resort, by way of executing and applying an existing ad valorem rate, until this very Tariff Act of 1922.

The currency cases, cited by the Government, Collector v. Richards, 23 Wall. 246; Cramer v. Arthur, 102 U. S. 612; Hadden v. Merritt, 115 U. S. 93, and the appraisement cases, Auffmordt v. Hedden, 137 U. S. 310; Passavant v. United States, 148 U. S. 214 (decision below G. A. 899, T. D. 11986); Stairs v. Peaslee, 18, Howard 521; Passavant v. United States, 169 U. S. 16 (decision below G. A. 1602, T. D. 13181), did not involve the question of delegating legislative power. That question is not discussed in the opinions. The question discussed in all of them was whether or not there was any judicial review (and its scope, and the consequent relief vel non on the merits) of the liquidations and appraisements there contested. They consequently give no support to the Government's contention here. The same thing is true of the countervailing [fol. 63] duty cases also cited by the Government, Downes v. United States, 187 U. S. 496 (affirming G. A. 4912, T. D. 22984); Nicholas v. United States, 249 U. S. 34 (affirming G. A. 7758, T. D. 35595), where the issue was whether a bounty or grant had been actually bestowed by the foreign country. No question of delegating legislative power was raised or discussed. Again, the fact that judicial review was denied of certain findings made in those cases and in Franklin Sugar Refining Co. v. United States, 178 Fed. 743, has nothing to do with the question of delegating legislative power, or with the determination of the issues before us.

In the case of Buttfield v. Stranahan, 192 U. S. 470, the act under consideration provided:

> That it shall be unlawful for any person or persons or corporation to import or bring into the United States any merchandise as tea which is inferior to purity, quality, and fitness for consumption to the standards provided in section three of this act, and the importation of all such merchandise is hereby prohibited.
>
> That immediately after the passage of this act, and on or before February fifteenth of each year thereafter, the

Secretary of the Treasury shall appoint a board, to consist of seven members, each of whom shall be an expert in teas, and who shall prepare and submit to him standard samples of tea; that the persons so appointed shall be at all times subject to removal by the said Secretary, and shall serve for the term of one year; * * *

That the Secretary of the Treasury, upon the recommendation of the said board, shall fix and establish uniform standards of purity, quality, and fitness for consumption of all kinds of teas imported into the United States, and shall procure and deposit in the custom houses of the ports of New York, Chicago, San Francisco, and such other ports as he may determine, duplicate samples of such standards. * * * All teas, or merchandise described as tea, of inferior purity, quality, and fitness for consumption to such standards shall be deemed within the prohibition of the first section hereof.

[fol. 64] Mr. Justice White, after holding that Congress has from the beginning exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries, said, page 496:

We may say of the legislation in this case, as was said of the legislation considered in Field v. Clark, that it does not, in any real sense, invest administrative officials with the power of legislation. Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such duty would, in effect, amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.

A careful analysis strikingly differentiates that case from the case at bar,

(1) It does not deal with taxes,

(2) It would be impossible to say that to deny the power of Congress to delegate to executive authority the right to change a duty to equalize foreign and domestic production costs would in effect amount to declaring that the plenary power vested in Congress to levy import duties could not

be efficaciously exerted. That claim would be a little late after Congress for more than 135 years had itself (without any attempt at delegation) levied, during peace and war, all import duties and all other taxes necessary "to pay the debts and provide for the common defense and general welfare of the United States."

(3) Because the establishment of tea standard could, and was reasonably held to be the ascertainment of a fact, as distinguished from a mere guess or conjecture, upon which the Act of Congress expressing its will to exclude from the commerce of the United States tea of inferior purity, quality, and fitness for consumption to such standards, could be made to depend.

[fol. 65] (4) In the tea case Mr. Justice White says:

Whether or not the Secretary of the Treasury failed to carry into effect the expressed purpose of Congress and established standards which operated to exclude teas which would have been entitled to admission had proper standards been adopted, is a question we are not called upon to consider.

That clearly implies that if improper standards had been adopted by the Secretary such act would have been subject to judicial review, at least for bad faith or malice.

It is elementary, on the other hand, that the power here sought to be given to the President is, by its very nature (and also because the President himself exercises it) subject to no judicial review whatsoever. The act does not give, and could not give, to any court judicial authority to review the President's action under these provisions, or to inquire into his motives or good faith in fixing or failing to fix, a particular rate.

If the Tariff Commission reported the necessity of a particular increase, or decrease, of an existing rate by 50 per centum, or the change from a foreign valuation to the socalled American valuation of a similar competing domestic article, and the President refused to declare such change, no court could compel him to do so. Again, if the Tariff Commission reported an increase by 50 per centum and he declared an increase of only 40 per centum, no court could decide whether the Tariff Commission's judgment

should be substituted for his or that the facts warranted either rate.

As soon as an investigation is had by the Tariff Commission the President's discretionary power over the rate investigated, within the limits fixed by the statute, becomes absolute and final. Within those limits he may fix any rate he pleases up or down (or by change of ad valorem), entirely irrespective of, and, if he so finds, directly contrary to, the recommendation of the Tariff Commission. He may even ignore the investigation entirely and decline to make a recommended change. Nothing could more clearly express the power to tax directly lodged in the Executive himself.

[fol. 66] The above considerations demonstate that the case of Buttfield v. Stranaham gives no support to the legality of the power here sought to be granted.

The case of United States v. Grimaud, 220 U. S. 506, cited by the Givernment, dealt with a totally different situation. There was involved only the regulation, management and control of Government property, distinctly an executive duty. Congress expressly authorized the Secretary of Agriculture to make regulations for the management and control of grazing upon a forest reserve for its protection. Congress itself prescribed the penalities for their breach. The authority to make such administrative rules was not a delegation of legislative power at all. The Secretary was not finding facts which would bring a law into effect, but merely managing Government property as directed by Congress. The court says, page 532: "A violation of reasonable rules regarding the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the "penalty."

An analogy is claimed between the levying of a tax through executive authority based on differences in production costs and the action of the Interstate Commerce Commission in first deciding that a rate charged by a common carrier for some public service is unreasonable, and then declaring what will be a reasonable charge for such service.

But historically such analogy fails completely. For declaring a charge for some public service to be unreasonable,

finding a reasonable charge, and giving damages for the difference between the two, was an accepted part of the jurisdiction of all common law courts and exercised by them until such commissions were established. Mr. Justice White, in Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426, says, on page 436:

Without going into detail, it may not be doubted that at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that when a carrier accepted goods without payment of the cost of carriage or an agree-[fol. 67] ment as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that everywhere, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge. 2 Kent, Comm. 599, and note a; 2 Smith Lead. Cas., pt. 1, 8th Ed., Hare & Wallace notes, p. 457.

After which he concludes that this common law jurisdiction was taken away by the passage of the Interstate Commerce Act given power to pass on the reasonableness of charges to the Interstate Commerce Commission.

The fact is that the powers these commissions exercise (whatever they are now called) thus arose as a judicial function (deciding what was fair or reasonable between conflicting interests) and developed from that. They can now be used in the present form, through such commissions, as more convenient and effective than such original common law jurisdiction. And the same thing is true of the powers of the Federal Trade Commission, subject as they are to judicial review, a mere practical expansion or application of the judicial power existing at common law to curb monopoly and unfair trade practices.

Even after the passage of the Hepburn Act in 1906 giving the Interstate Commerce Commission power to affirmatively fix rates the Supreme Court said in I. C. C. v. L. & N. R. R. Co., 227 U. S., at page 92:

Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the commission may set them aside and require the substitution of just for unjust charges.

In that case the court also points out the judicial review which may be had of the commission's action.

When we come to look at taxation we find no such history. It never was the function of any court to pass on the reasonableness vel non of a tax. Patten v. Brady, 184 U. S., [fol. 68] at page 623; Flint v. Stone, etc., 220 U. S., at page 167; McCray v. United States, 195 U. S., at page 58. The sole function of the courts, in relation to taxes, is to say whether they have been legally appraised and levied upon a proper construction of the statute or whether the statute is a violation of constitutional principles. Therefore it seems clear that no strengthening analogy can be invoked from the quasi-judicial function performed by the Interstate Commerce Commission, with review of its findings for illegality by the courts, in support of the idea that the Legislature might declare a rule of reasonableness, for instance, in relation to taxation and leave it to executive authority to determine what was reasonable and what was not (the Government's contention must go that far); or similarly to declare a rule, as proposed by these provisions, to have the executive authority to fix a tax that would meet the supposed differences between cost of production at home and abroad. A mere glance at the origin, history, and purpose of the power to fix reasonable charges exercised by the Interstate Commerce Commission and the power of taxation here sought to be given to executive authority, shows their complete and fundamental difference. A tax is not a toll. "A tax is a demand of sovereignty, a toll is a demand of proprietorship." Reading R. R. Co. v. Pa., 15 Wallace 232, at page 278.

We are not here dealing with carriers and their legal charge for services. The levy of a tax rate to equalize "differences in cost of production" (even if capable of accurate ascertainment) is not a justiciable subject matter, nor a duty which can be laid upon the courts, either directly or through review of the acts of a commission. Any attempt to so construe these provisions, and thus endeavor to save

an illegal delegation of legislative power, by making justiciable what inherently is not justiciable, involves a hopeless confusion of thought and an utter abandonment of the vital principles of the American Constitutional system. It would be an attempt to first make a delegation of the taxing power to the executive and justify that by passing the delegated power on to the courts, thus making of the Supreme Court, in particular, a sort of council of "Elder Statesmen" to determine our taxation system or carry out an inherently uncertain scheme of taxation based on differences in production costs.

[fol. 69] This should clearly demonstrate that the complicated quasi-judicial form of the novel process here provided for, before and by the Tariff Commission (an arm of the executive) for determining differences in production costs, as to such articles as they, in their discretion (or upon the President's suggestion), shall choose to so determine, as a result of such hearings as they shall have, plus the results of such necessarily ex parte investigation as they must employ, plus a further discretion to the President to follow their findings, and declare the equalizing tax, or not, as he sees fit, after consulting others if he desires, and later to revoke the proclaimed rates when he so decides; is nothing more than a complicated machinery for the taxation of the citizen by executive judgment and discretion and as such plainly an unconstitutional delegation of legislative power.

(2) Moreover, the plan before us is beyond the power of Congress even if it is not held to be an illegal delegation of legislative power. For it purports upon its face to make a levy for a private purpose. It can not be denied that a tariff based upon differences in foreign and domestic production costs executes a frankly declared protective policy. Let this phase of the issue be clearly stated. It is whether the levy itself, laid ostensibly for what we call "protection," and frankly not for the purpose of raising revenue, falls within the definition of the term "tax," levied to pay the debts and provide for the common defense and general welfare of the United States, for which alone authority is given to Congress.

The question is whether a levy can be made, not ostensibly for revenue, thus placing the motive of Congress be-

yond judicial inquiry, but frankly, and on the face of the statute, for a trade advantage to particular citizens (any revenue raised therefrom being merely incidental or accidental) and still be called a tax laid for the "common defense and general welfare."

The rate of 4 cents per pound upon barium dioxide, fixed by the Congress itself in the Act of 1922, is laid in the familiar form used for the purpose of raising revenue (whatever its incidental effect) since the formation of our present Federal Government. The legality of that rate so levied can not be contested. To permit the courts to take proof of its effect, and inquire into the motives of the Con-
[fol. 70] gress in levying a duty in that form, would upset the Government and transfer powers over legislation and over taxation to the judicial branch. The additional 2 cents per pound, however, is expressly stated, by the Congress in Section 315, as well as by the executive proclamation fixing its amount, and directing its levy; to be levied for the sole purpose of equalizing production costs at home and abroad.

Cooley, in his General Principles of Constitutional Law (his law primer for the use of students), Angell edition 1891, p. 54, defines taxes as regular impositions made by Government "for the purpose of raising public revenue."

On page 56 under the title, "The Purposes," he says:

"Constitutionally a tax can have no other basis than the raising of a revenue for public purposes, and whatever governmental exaction has not this basis is tyrannical and unlawful. A tax on imports, therefore, the purpose of which is not to raise a revenue, but to discourage and indirectly prohibit some particular import for the benefit of some home manufacture, may well be questioned as being merely colorable, and therefore not warranted by constitutional principles. But if any income is derived from the levy, the fact that incidental protection is given to home industry can be no objection to it, for all taxes must be laid with some regard to their effect upon the prosperity of the people and the welfare of the country, and their validity cannot be determined by the money returns. This rule has been applied when the levy produced no returns whatever; it being held not competent to assail the motives of Congress by showing that the levy was made, not for the purpose of

revenue, but to annihilate the subject of the levy by imposing a burden which it could not bear. Practically, therefore, a law purporting to levy taxes, *and not being on its face subject to objection,* is unassailable, whatever may have been the real purpose. * * * (Italics ours.)

The apparent qualification manifestly refers to an ordinary levy in form for revenue and not to a provision expressing, as does the one before us, the purpose of protection on its face.

[fol. 71] In South Carolina v. United States, 199 U. S. 437, Mr. Justice Brewer, speaking for the majority of the court, says, page 450:

By this clause (the tax clause) the grant is limited in two ways: The revenue must be collected for public purposes and all duties, imposts, and excises must be uniform.

In the case of United States v. Boyer, 85 Fed. 425, at page 432, Rogers, District Judge, says that the words:

"and provide for the common defense and general welfare of the United States" according to the most liberal constructionist, is a limitation on the taxing power of the United States, and that only.

In the case of Loan Association v. Topeka, 20 Wallace 655, Mr. Justice Miller says on page 664:

We have established, we think beyond cavil, that there can be no lawful tax which is not laid for a public purpose.

For conclusive arguments demonstrating that the words "general welfare" as used in the tax clause grant no power whatsoever to the Congress see (1) statement of George Nicholas in answer to Patrick Henry in the Virginia Ratification Convention, 3 Elliott's Debates 244, 245, (2) Paul Leicester Ford's "Jefferson," vol. eleven, page 489, (3) the 41st number of the Federalist, written by James Madison, and (4) speech of Henry St. George Tucker in the House of Representatives March 3, 1926.

No court has ever declared this reference to the "general welfare" to be a grant of power. None ever will. Certainly no court will ever say that it grants power to delegate a trust committed by the people to Congress alone.

Again, a prohibited tax levy or delegation can not become legal by calling it a regulation of commerce as this Section 315 purports to do.

If that were so all express and implied limitations upon the power of taxation would be done away, if the particular act affected commerce, as most taxation does, and it was [fol. 72] merely called a regulation of commerce. These provisions of Section 315 must stand or fall for what they are upon their face, namely, a levy frankly for protection and the attempted delegation of the power to tax, and not by what they are called. (See Child Labor Case, 259 U. S. 20; Hill v. Wallace, 259 U. S. 44, and Trusler v. Crooks, decided by the Supreme Court Jan. 11, 1926.) If illegal, as a tax, or as a delegation, the fact that they affect commerce will not save them.

In deciding this case we are bound in our action by the fundamental principle stated by that great judge, James Iredell of North Carolina (afterwards of the Supreme Court), as far back as August 17, 1786, when, in defending the decision in Bayard v. Singleton, 1 Martin's North Carolina Reports, 48, in which he had been one of the counsel, he said:

> An Act of Assembly cannot repeal the Constitution or any part of it * * *. The judges therefore must take care at their peril that every act of the assembly they presume to enforce is warranted by the Constitution, since, if it is not they act without lawful authority. This is not a usurped or a discretionary power, but one inevitably resulting from the constitution of their office, being jurors for the benefit of the whole people not mere servants of the assembly. (The Life and Correspondence of James Iredell, by McRee, vol. 2, page 148.)

These words of that great jurist are directly applicable to our duty here, convinced, as I think we should be, that there is plainly a total lack of constitutional power to accomplish the end here sought.

Neither the doctrine of implied powers, nor the power given to Congress in Sub-section 18 of Section 8 of Art. I, to pass all "necessary and proper" laws to carry out the powers expressly granted, gives any support to the Government position. Power to delegate to executive discre-

tion the levy of a tax upon the citizen can never be implied from the grant of such a trust to Congress alone. Nor could such delegation ever be "necessary and proper" as a means of carrying out a trust exclusively committed to Congress. Nor, if there were no delegation of legislative [fol. 73] power involved, can a levy, upon the face of the statute for protection alone be a tax for the "general welfare."

I feel constrained to hold, for the reasons above set forth, that the portion of the act before us (Section 315), so far as it purports to authorize this increased levy, is contrary to the tenor of the commission granted by the people of the several states to their federal legislative agency, and is therefore void. Judgment should issue sustaining the claim in the protest for classification at 4 cents per pound under paragraph 12 of said act and directing refund of the excess collected above that rate.

The above, upon a subject regularly assigned to the writer, was prepared as for a proposed Board decision. Being disapproved by the majority it is now respectfully filed as a dissenting opinion.

The Constitution may be more easily undermined, and its safeguards frittered away, by specious arguments and strained construction invoked to avoid its plain limitations, than it can be destroyed by direct attack. Consequently it is the duty of all courts (lower courts as well as appellate courts), in deciding constitutional cases, to be eternally vigilant in guarding and defending the fundamental American principles and traditions which that great instrument was designed to secure and perpetuate. The issue is a momentous one and of vital consequence to the future history of this country. Only to the casual and the thoughtless will it seem unimportant. Only they will assume, as of course, the legality of this grave and serious departure from our traditional method of levying federal taxation. The result will affect, not only this plaintiff, but the whole people of America in their historic freedom from the dangers of taxation by executive discretion.

If the majority conclusion is right, the Congress, by declaring a few general principles of taxation, can abdicate the substance of its legislative trust over that entire subject, and pass its representative responsibility over this

power to destroy, to bureaus and commissions (fortified by Presidential Proclamation); thus leaving the people, their business and their property, entirely at their mercy, and necessarily without court review of their taxing discretion. This, in my opinion, is not the American form of represen-
[fol. 74] tative federal government which the Constitution established—at least not the kind I was brought up to believe in.

Geo. Stewart Brown, U. S. General Appraiser.

BEFORE BOARD OF UNITED STATES GENERAL APPRAISERS

No. 1

[Title omitted]

Present: General Appraisers McClelland, Sullivan, Brown.

JUDGMENT—April 6, 1926

The above entitled cause having regularly come on to be heard, and the Board, in its decision dated the 6th day of April, 1926, having determined the law and facts in favor of the Government;

It is hereby ordered, adjudged, and decreed, that the protest in this case be and the same is hereby overruled.

Chas. P. McClelland, Chairman Board 1, by D. P. Dutcher, Chief Clerk. (Seal.)

[fol. 75] IN UNITED STATES COURT OF CUSTOMS APPEALS

[Title omitted]

ORDER ALLOWING FILING OF BRIEF AS AMICUS CURIÆ—June 22, 1926

Charles F. Kingsley, attorney for National Council of American Importers and Traders, Inc., having heretofore applied for leave to file brief in the above-entitled appeal as amicus curiæ, it is

Ordered that said leave be, and the same is hereby, granted, said brief to be filed with the Clerk of this Court and served on all counsel in said appeal on or before July 22, 1926.

* * * * * * *

(Signed) William J. Graham, Presiding Judge.

Minute entry of argument and submission October 6, 1926; omitted in printing.

[fol. 76] In United States Court of Customs Appeals

[Title omitted]

Certificate of Importance—Filed October 20, 1926

To the Honorable the Judges of said Court:

In accordance with the provisions of the Act of Congress establishing the United States Court of Customs Appeals, I hereby certify that, in my opinion, the case above-stated is of such importance as to render expedient its review by the Supreme Court of the United States in the manner provided by said act.

This 16th day of October, 1926.

Jno. G. Sargent, Attorney General.

O. K. W. D. M.

[File endorsement omitted.]

[fol. 77] IN UNITED STATES COURT OF CUSTOMS APPEALS, OCTOBER TERM, 1926

[Title omitted]

Flexible Tariff Provisions—Constitutionality

OPINION

GRAHAM, Presiding Judge, delivered the opinion of the court:

The Tariff Act of 1922 contains the following duty provision:

12. Barium carbonate, precipitated, 1 cent per pound; barium chloride, 1¼ cents per pound; barium dioxide, 4 cents per pound; barium hydroxide, 1¼ cents per pound; and barium nitrate, 2 cents per pound.

That act also contains the following administrative provision:

Sec. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): Provided, that the

total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in costs of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown [fol. 78] that the said differences in costs of production in the United States and the principal competing country can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands,

the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraphs (1), (2), and (3) of subdivision (a) of section 402 of this Act.

(c) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the arti-

[fol. 79] cles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(d) For the purposes of this section any coal-tar product provided for in paragraphs 27 or 28 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results substantially equal to those accomplished by the domestic product when used in substantially the same manner.

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

(f) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported articles of the class or kind of articles upon which the President has made a proclamation under the provisions of subdivision (b) of this section and for the form of invoice required at time of entry.

On May 19, 1924, the President, claiming to act under and by authority of said section 315, issued the following proclamation, which was thereafter duly published. T. D. 40216, 45 Treas. Dec. 669, to wit:

A Proclamation

Whereas in and by section 315 (a) of Title III of the act of Congress approved September 21, 1922, entitled "An act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes," it is, among other things, provided that whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in cost of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and

proclaim the changes in classifications or increases or decreases in rates of duty provided in said act shown by said ascertained differences in such costs of production necessary to equalize the same;

Whereas in and by section 315 (c) of said act it is further provided that in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of said section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition;

Whereas, under and by virtue of said section of said act, the United States Tariff Commission has made an investigation to assist the President in ascertaining the differences in costs of production of and of all other facts and conditions enumerated in said section with respect to the article described in paragraph 12 of Title I of said tariff act of 1922, namely, barium dioxide, being wholly or in part the growth or product of the United States, and of and with respect to [fol. 80] a like or similar article wholly or in part the growth or product of competing foreign countries;

Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence, and to be heard;

And whereas the President upon said investigation of said differences in costs of production of said articles wholly or in part the growth or product of the United States and of the like or similar article wholly or in part the growth or product of competing foreign countries, has thereby found that the principal competing country is Germany and that the duty fixed in said title and act does not equalize the differences in costs of production in the United

States and in said principal competing country, namely, Germany, and has ascertained and determined the increased rate of duty necessary to equalize the same.

Now, therefore, I Calvin Coolidge, President of the United States of America, do hereby determine and proclaim that the increase in the rate of duty provided in said act shown by said ascertained differences in said costs of production necessary to equalize the same is as follows:

An increase in said duty on barium dioxide (within the limit of total increase provided for in said act) from 4 cents per pound to 6 cents per pound.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this nineteenth day of May in the year of our Lord one thousand nine hundred and twenty-four, and of the independence of the United States of America the one hundred and forty-eighth.

Calvin Coolidge.

By the President: Charles E. Hughes, Secretary of State. (Seal.)

On June 19, 1924, the appellant imported at the port of New York 292 drums of barium dioxide, which was duly classified for, and assessed with, duty by the collector at 6 cents per pound, in accordance with the aforesaid proclamation of the President. Against this action by the collector, the importer duly filed its protest, alleging therein that the goods were properly dutiable at 4 cents per pound, as fixed by paragraph 12 of said Tariff Act of 1922, that said section 315 was and is unconstitutional, and that all acts pretended to be done thereunder by the President were null and void. This protest was, in due course, referred by the collector to the Board of General Appraisers, and the board, General Appraiser Brown dissenting, overruled the protest and sustained the assessment by the collector. Following the judgment resulting therefrom, the appellant has brought the cause to this court for review.

Many assignments of error are made. These, however, we think may be expressed in three propositions, namely:

First. Said section 315 is unconstitutional in that it attempts to delegate to the President the power to legislate,

a power which can be exercised only by the Congress under Article I, section 1, of the Constitution:

[fol. 81] Sec. 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Second. Said section 315 is unconstitutional in that it attempts to delegate to the President the power to tax, a power which can be exercised only by the Congress under Article I, section 8, of the Constitution:

Sec. 8. The Congress shall have power to lay and connect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

Third. Said section 315 is a provision, not for a tax, duty, of excise, but solely for the protection of industries of the United States; and the Congress may not, under the powers given it by the Constitution, so legislate.

It is conceded by the parties that all acts of the President and other officials in the levying of the duty herein have been in conformity with the letter of said section 315.

These propositions will be dealt with as stated.

In considering these matters, certain cardinal principles of interpretation will be borne in mind: First, it is the duty of this court to attempt to ascertain the legislative will, as expressed in the act before us, and to give it effect, if possible; second, every reasonable presumption must be entertained in favor of the validity of the act in question. Adkins v. Children's Hospital, 261 U. S. 525 (544).

On December 6, 1921, the President of the United States, in his annual message to the Congress, called attention to the unsettled international conditions brought about by the World War, and recommended the creation of some legislative machinery whereby customs duties might be made more flexible, to meet such rapidly changing conditions and to prevent the undermining of our national industries. Cong. Rec., vol. 62, pt. 1, p. 37. On August 10, 1922, the Committee on Finance of the Senate presented through its chairman, Mr. McCumber, an amendment to H. R. 7456, then pending before the Senate, which, amended,

became ultimately said section 315. From the remarks of Mr. McCumber on the floor of the Senate while presenting said amendment, Cong. Rec. vol. 62, Pt. 11, pp. 11152-11160, and from the report of the Senate Committee on Finance, S. Rept. No. 595, 67th Cong., 2d sess., it appears that said section 315 was intended to meet the suggestions made by the President in his said message and to provide a method of protecting the industries of the United States during the period of world-wide economic disturbance following the World War.

Section 315 is, obviously, framed to meet these desired [fol. 82] ends. In brief, it provides:

(a) If the President shall find that the duties fixed in the Tariff Act of 1922 do not equalize the differences in costs of production in the United States and the principal competing countries, he shall ascertain the differences and determine and proclaim changes in classifications or increases or decreases in the rates of duty provided by the act sufficient to equalize the said differences in costs of production; but the total increases or decreases shall not exceed 50 per centum of the rates provided in the act.

(b) If the President finds, as to any articles, that he cannot equalize said costs of production under (a), he shall so proclaim, together with a description of the articles to which the proclamation applies; and thereafter the ad valorem duties on such articles shall be based upon their American selling price. These ad valorem rates shall be sufficient to equalize said costs of production, but shall not be decreased more than 50 per centum of the rates named in the act, and such named rates can not be increased.

(c) This subsection enumerates the various factors which the President may consider in so far as he finds it practicable, in ascertaining such differences in costs of production. These are, briefly (1) Differences in conditions in productions; (2) differences in the wholesale selling prices; (3) advantages granted to a foreign producer by his Government, or others; and (4) any other advantages or disadvantages in competition. It provides that the United States Tariff Commission shall make public investigations to assist the President; that no proclamation shall be made by the President until such an investigation has been made;

that whenever he determines that the conditions which brought about such proclamation have changed or no longer exist, he shall modify or terminate it; that he may not transfer any article from the free list to the dutiable list or vice versa, or change any duty in form, and that whenever the act provides a maximum ad valorem duty, he may not exceed that maximum rate.

The three remaining subdivisions are immaterial in so far as this inquiry is concerned.

It is most vigorously contended that this legislative plan is an attempt by the Congress to delegate to the President its power to legislate and fix rates of duties on imports, a power which, under the Constitution, can be exercised only by it. It will be at once conceded by all that, if said section 315 is such an attempted delegation, it can not stand. No. principle is more vital to our national perpetuity, more zealously guarded by our courts, or more earnestly adhered to by our people than the continuance of the integrity and independence of the three departments of our Government—the legislative, the executive, and the judicial.

[fol. 83] What constitutes a delegation of legislative power has been a subject of frequent consideration by our courts.

The Supreme Court, In re Brig Aurora, 7 Cranch, 382, had before it the foreiture of a British vessel which had been sized by virtue of the provisions of an act of Congress dated May 1, 1810, intended to preserve the neutral commerce of the United States from violation. The revival of certain of the provisions of this law depended upon the issuance of a proclamation by the President, after a finding of fact by him, and it was contended that this was a delegation of legislative power. The Supreme Court held to the contrary.

In Miller v. Mayor of New York, 109 U. S. 385, the court had under consideration the act of Congress of March 3, 1869, 15 Stat. 336, ch. 139, granting authority to erect a bridge over the East River and giving to the Secretary of War power to prescribe conditions upon which it should be built. This was held not to be a delegation of legislative power, and it was said:

The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate.

Perhaps the leading case and the one most often cited as to what constitutes and what does not constitute a delegation of legislative power is Field v. Clark, 143 U. S. 649. In that case the constitutionality of section 3 of the tariff act of October 1, 1890, was challenged. That section provided that whenever the "President shall be satisfied" that the government of any country producing and exporting sugars, etc., was imposing duties or other exactions upon the products of the United States which, in view of the free introduction of such sugars, etc., into the United States "he may deem to be reciprocally unequal and unreasonable," it should be his duty, by proclamation, to suspend the provisions permitting free entry of such sugars, etc., for such time as "he shall deem just." The act fixed rates of duties to be levied during the continuance of such proclaimed period. Mr. Justice Harlan, in the comprehensive and erudite opinion filed in the case, called attention to the many similar laws enacted continuously since the foundation of the Government which conferred upon the Chief Executive the power to find the facts upon which their going into effect severally depended. In conclusion, the learned jurist summed up in a quotation from Locke's Appeal, 72 Pa. St. 491 (498):

The legislature can not delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or in- [fol. 84] tends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which can not be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation.

Buttfield v. Stranahan, 192 U. S. 470, involved the constitutionality of a Statute known as the tea inspection act, approved March 2, 1897, 29 Stat. 604. That statute pro-

hibited the importation of tea inferior to standards to be fixed by the Secretary of the Treasury, upon the recommendation of a board of seven members to be appointed by him. This statute also provided that, if imported tea was not up to said standards, it should be exported within six months, or, in default thereof, be destroyed by the customs authorities. It was claimed there, as here, that this was a delegation of legislative authority. This claim, however, was not entertained by the court, and it was said:

We are of opinion that the statute, when properly construed, as said by the Circuit Court of Appeals, but expresses the purpose to exclude the lowest grades of tea, whether demonstrably of inferior purity, or unfit for consumption, or presumably so because of their inferior quality. This, in effect, was the fixing of a primary standard, and devolved upon the Secretary of the Treasury the mere executive duty to effectuate the legislative policy declared in the statute. * * * Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute.

The constitutionality of various similar provisions in other acts has been challenged on similar grounds and the validity of such provisions upheld in the following cases: A provision of the national bankruptcy act of July 1, 1898, recognizing the exemptions fixed by the law of the bankrupt's domicile, in Hanover National Bank v. Moyses, 186 U. S. 181; the act of October 19, 1888, authorizing the Secretary of the Treasury, in case she shall be satisfied an alien is landed contrary to law, to detain and deport him, in the Japanese Immigrant case, 189 U. S. 86; the disposition of public lands by a state, through congressional authority, in Butte City Water Co. v. Baker, 196 U. S. 119; regulations of the Interstate Commerce Commission and Railway Association, fixing standards for draw bars for railway cars, in St. Louis & I. M. Ry. v. Taylor, 210 U. S. 281; orders of the Interstate Commerce Commission establishing methods of accounting, in I. C. C. v. Goodrich Transit Company, 224 U. S. 194; the administration of the short and long haul provisions of section 4 of the act to regulate commerce, as amended by the act of June 18, 1910,

in Intermountain Rate case, 234 U. S. 476; the enforcement of a motion picture censorship law, in Mutual Film Corp. v. Ohio Industrial Com., 236 U. S. 230; a provision [fol. 85] of the Federal reserve act of December 23, 1913, authorizing the Reserve Board to grant special permits to certain national banks to act as trustees, etc., in First National Bank v. Union Trust Co., 244 U. S. 416.

In some cases powers granted to administrative or executive officials or bodies have been upheld as constitutional, even though the exercise of such powers has resulted in the imposition of fines or penalties upon a citizen.

Section 18 of the River and Harbor Act of March 3, 1899, provided that, whenever the Secretary of War had good reason to believe a bridge over a navigable stream was an unreasonable obstruction to navigation, he might, after hearing, order the same changed, and if there was a refusal, cause a prosecution to be had; and that, upon conviction, the offender should be fined as fixed by law. Under this act, in Monongahela Bridge Co. v. United States, 216 U. S. 177, the bridge company was fined, and contended in the Supreme Court that the act in question was a delegation of legislative power. The court did not agree with this contention, and said, in effect, that the statute had declared a general rule or policy, and had merely left to the Secretary of War the task of enforcing its provisions. The Court added:

* * * a denial to Congress of authority, under the Constitution, to delegate to an executive department or officer the power to determine some fact or some state of things upon which the enforcement of its enactment may depend, would often render it impossible or impracticable to conduct the public business, and to successfully carry on the operations of the Government.

To the same effect is Union Bridge Co. v. United States, 204 U. S. 364 (386, 387).

United States v. Grimaud, 220 U. S. 506, involved a regulation promulgated by the Secretary of Agriculture by virtue of the authority of the forest reserve act of March 3, 1891, 26 Stat. 1103, and its amendments. This act as amended provided that the Secretary of Agriculture might make regulations for the protection of such reserves and

that violators of such regulations should be subjected to certain penalties fixed by Revised Statutes, section 5388. Regulation 45, issued in pursuance to such authority, prohibited grazing in such reserves without a permit. Grimaud was indicted for a violation of such regulation, and the matter came up on a demurrer to this indictment, the defendant claiming an unconstitutional delegation of legislative authority. The court held, in an illuminating opinion, that there was no attempted delegation of legislative authority, saying, in part:

But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details."

[fol. 86] Hannibal Bridge Company v. United States, 221 U. S. 194, was a case involving a criminal information against the Hannibal Bridge Co. and others for failing to comply with the orders of the Secretary of War relative to a bridge across the Mississippi River. The defendant claimed an unconstitutional delegation of legislative authority to the Secretary of War. The court held to the contrary, saying:

All that the act did was to impose upon the Secretary the duty of attending to such details as were necessary in order to carry out the declared policy of the Government * * *.

The most recent announcement of the Supreme Court on this subject is found in United States v. The Chemical Foundation, Inc., decided October 11, 1926, 272 U. S. 1. This case involved, inter alia, section 12 of the trading with the enemy act of October 6, 1917, 40 Stat. 460, as amended. This section gave to the Alien Property Custodian all the powers of a common-law trustee, with power, under the supervision and direction of the President, to do anything necessary in the administration of the alien property trusts in his keeping. This was claimed to be a delegation of legislative power. But it was said by the court:

The determination of the terms of sales of enemy properties in the light of facts and conditions from time to time arising in the progress of war was not the making of a law; it was the application of the general rule laid down by the act. When the plenary power of Congress and the general

rule so established are regarded, it is manifest that a limitation upon the excepted class is not a delegation of legislative power.

The following authorities and cases announce the same general principles: Cooley on Taxation, vol. 1, p. 100; Gray's Limitations of Taxing Power, 539; Cooley's Cons. Lim., p. 164 (7th ed.); Willoughby on Constitution, sec. 775, p. 1318; St. L. M. B. Co. v. United States, 188 Fed. 195; State v. Public Service Com. (Mo.), 194 S. W. 287 (296); State v. Briggs, 77 Pac. 750 (Ore.); People v. Fire Assn., 92 N. Y. 311; State v. A. C. L. R. Co., 56 Fla. 616 (623-626); United States v. Domingo, 152 Fed. 566; Dastervignes v. United States, 122 Fed. 30; C. W. & Z. Railroad Co. v. Commissioners of Clinton County, 1 Ohio St. 87; State v. C. M. & St. P. Ry. Co., 38 Minn. 298-299; Wayman v. Southard, 10 Wheat. 1-41.

From a consideration of the authorities cited, it must be concluded that the law is well settled, and is, perhaps most happily expressed in C. W. & Z. Railroad Co. v. Commissioners, supra:

The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first can not be done; to the latter no valid objection can be made.

[fol. 87] And this must, by the very force of circumstances, be the conclusion inevitably to be arrived at by any judicial tribunal. To-day the functions and requirements of government are so diverse and multiplied that no legislative body can, by statutory enactment, provide for each specific governmental need which may arise. If, perchance, it has wisdom and foresight sufficient to provide general policies which may apply, it has accomplished much.

Viewing said section 315 in the light of these authorities and its legislative history, it at once becomes evident that the Congress has endeavored to express therein a general legislative policy. This policy is to levy upon imported products sufficient duties to equalize the differences in cost of production in the United States and the principal competing countries from which such imports come. Under

ordinary circumstances, the duties are those specifically named in the act; but, whenever these are insufficient to accomplish this expressed purpose, they shall be, within certain precautionary minima and maxima, increased or decreased accordingly. There is no uncertainty here as to the congressional intent and policy; no dicretion is attempted to be given to the President to determine what the policy shall be; the law imposes upon him no duties and confers upon him no powers except to execute the law, if it be capable of execution. When the President proclaims a change of rate thereunder, the new rate of duty does not come into being as a result of the proclamation, but the proclamation and the rate of duty result from the law.

But it is contended by the appellant, that, even it it be conceded that the Congress has, in section 315, announced a general policy and purpose, that purpose is impossible of accomplishment because of the uncertainty of the act itself; that, using the various factors set forth in subsection (c), the President will not be able to compute and ascertain the differences in cost of production of an imported product in the United States and the principal competing country; and that, even if he uses such factors, the language describing them is so broad and general as to leave him such latitude as to the means of computation that he may levy duties on imported products according to his discretion, thus exercising a purely legislative power.

Section 315, in substance, requires the President, before proceeding to make a change in the dutiable rate of an article, to make two findings of fact. First, he must find that the rate of duty specifically fixed by the act is not sufficient to equalize the differences in cost of production in the United States and in the principal competing country. To do this, the President must, of course, ascertain three subsidiary facts: (a) What the principal competing [fol. 88] country is; (b) what the cost of production is in the United States; and (c) what the cost of production is in the principal competing country. Second, he must find what amount of decrease or increase of rate is necessary to equalize such difference. When he has made these findings of fact, the mandatory duty is laid upon him by the statute to make proclamation accordingly; in this respect, the law gives him no discretion.

It will be at once conceded, on a reading of section 315 (c), that a very broad latitude is given to the President in making such findings of fact. The various factors named in the subsection are to be used by him "in so far as he finds it practicable." A consideration of this language, taken with clause 4, "any other advantages or disadvantages in competition," makes it manifest that the Congress intended to give to the President and to the Tariff Commission prosecuting the same inquiry, discretion as to the means to be employed in ascertaining the facts; the factors were not to be confined to those enumerated in the statute, but, in order that there might be no misunderstanding as to the factors which might be considered, it was provided that the various factors specifically named might, inter alia, be considered by the President, if practicable, in arriving at the result.

From a very early period in our Government similar fact-finding powers to those here directed to be exercised by the President have been exercised by various officials connected with the collection of import duties. The act of April 20, 1818, 3 Stat. 433, provided for the appointment of appraisers at certain ports of the United States, whose duty it was to estimate, in certain cases, the foreign market value of imported goods subject by law to ad valorem duties. No legislative restrictions or directions were made as to methods to be employed by them in arriving at such values. They were required only to find the facts, in any way they thought best. This general authority of appraisers, further developed by section 4 of the act of May 28, 1830, 4 Stat. 410, has continued until the present time. Tariff Act of 1922, sec. 500. The tariff act of August 30, 1842, 5 Stat. 563, section 16, provided that imported goods subject to ad valorem duties should be appraised according to their wholesale market value in the principal markets of the countries from which exported. It will not be necessary for the purposes of this opinion to more than refer, in passing, to the development of the method of appraisement by the creation of local appraisers and a board of three general appraisers. Sections 12-13, customs administrative act of June 10, 1890, 26 Stat. 136-137. We have, in United States v. Spingarn, 5 Ct. Cust. Appls. 2, traced the development of the methods [fol. 89] of appraisement of imported merchandise. See

also United States v. McConnaughey & Co., 13 Ct. Cust. Appls. 112.

By means of this legislative machinery, for over one hundred years the foreign market values of vast quantities of imported goods have been fixed at our ports and the principal markets of foreign countries have been ascertained. Necessarily, many elements have entered into such calculations, elements which have differed according to the circumstances of the particular case and the judgment of the appraiser who functioned in the matter. There could be no uniformity of procedure or scientific accuracy in such appraisements. It will be noted also that such appraisements determined the amount of ad valorem duties to be collected, unless entered at a higher value. Yet, whenever such appraisements have been questioned in the courts they have been sustained and the findings of fact made by the appraising officer or officers have been held to be conclusive, except when errors of law have intervened. Stairs v. Peaslee, 18 How. 521 (527); Hilton v. Merritt, 110 U. S. 97 (106-107); Auffmordt v. Hedden, 137 U. S. 310 (324); Passavant v. United States, 148 U. S. 214 (220-221); Muser v. Magone, 155 U. S. 240 (247); Beer v. United States, 1 Ct. Cust. Appls. 484; Austin, Baldwin & Co. v. United States, 7 Ct. Cust. Appls. 186; Stirn v. United States, 10 Ct. Cust. Appls. 17; Goodyear Tire & Rubber Co. v. United States, 11 Ct. Cust. Appls. 351. The decisions cited are based in part upon the principle of inviolability attached to the finding of fact by an administrative official when he proceeds within the law, and in part upon statutory enactments making such appraisements final and conclusive. Sec. 14, customs administrative act of June 10, 1890, 26 Stat. 137; sec. 13, tariff act of August 5, 1909, 36 Stat. 99; par. M, Sec. III, tariff act of October 3, 1913, 38 Stat. 186. While we do find that the constitutionality of the various statutes providing for such appraisements or making the same conclusive has been directly attacked in the cases cited, as a delegation of legislative power, the facts that for a century the legislative policy has been indicated by these various acts, and that they have been universally treated by the courts as valid must be given great weight in coming to a conclusion as to their validity.

The act of March 3, 1873, 17 Stat. 602, instructed the Director of the Mint to estimate annually the values of standard coins of foreign countries and the Secretary of the Treasury to proclaim such values annually. A similar method of ascertainment of such values still obtains. Sec. 522, Tariff Act of 1922. Such ascertainment necessarily leaves to the official making it a wide latitude as to methods. It follows that the amount of duty may be affected by the methods used and results obtained by this official. Such statutes have, however, universally received the approval [fol. 90] of the courts. Cramer v. Arthur, 102 U. S. 612; Hadden v. Merritt, 115 U. S. 25 (27); United States v. Klingenberg, 153 U. S. 93 (100).

Section 5 of the tariff act of July 24, 1897, provided for a countervailing duty to be levied upon the products of any country which bestowed any grant or bounty upon goods exported; the net amount of these bounties or grants was to be ascertained and proclaimed from time to time by the Secretary of the Treasury. No method was prescribed by which these determinations should be made. A similar provision still obtains in the law of customs. Sec. 303, Tariff Act of 1922. The exercise of these functions by the Secretary of the Treasury has been judicially approved, although the extreme difficulty of making such ascertainment has not been overlooked by the courts. Downs v. United States, T. D. 22984, 4 Treas. Dec. 405; aff. in 113 Fed. 144; aff. in 187 U. S. 496. Nicholas & Co. v. United States, 7 Ct. Cust. Appls. 97, aff. in 249 U. S. 34.

Section 11 of the tariff act of July 24, 1897, 30 Stat. 212, contained a provision that when the actual market value of an imported article could not be ascertained "to the satisfaction of the appraising officer," he should estimate the cost of production thereof and return the same as the dutiable valuation. This provision of law was continued in section 11, tariff act of August 5, 1909, 36 Stat. 97; in paragraph L, section III, tariff act of October 3, 1913, 38 Stat. 185; and in section 402 (c), Tariff Act of 1922, 42 Stat. 949. It will thus be seen that this provision of law, which, it must be assumed, was functioning in a satisfactory manner, has received legislative approval for many years. This court has on several occasions, while not called upon to decide the constitutional question here involved, inter-

preted and sustained it. Austin, Baldwin & Co. v. United States, 7 Ct. Cust. Appls. 186; Stirn v. United States, 10 Ct. Cust. Appls. 17; Goodyear Tire & Rubber Co. v. United States, 11 Ct. Cust. Appls. 351.

Paragraph 28 of the Tariff Act of 1922 fixes certain ad valorem duties upon enumerated coal-tar products, providing that the duties shall be computed upon the American selling price of the same. The American selling price, as defined in section 402 (f) of the same act, is the price, including cost of containers and other costs, etc., incident to placing the merchandise in condition packed ready for delivery, at which the said article is "freely offered for sale to all purchasers in the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities in such market," or the price which the owner, etc., would have received or was willing to receive for such merchandise when sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation. It will be observed that an extremely wide [fol. 91] range of discretion is given by this statute to the appraising officer as to methods of ascertainment of the American selling price. Upon the result of the methods used by him, the amount of duty paid will be increased or decreased. In Kuttroff, Pickhardt & Co. v. United States, 12 Ct. Cust. Appls. 299, the constitutionality of this statute was challenged, it being claimed that, as a matter of fact, the Congress had by said paragraph 28 delegated to the American producers the power to fix the rates of duty upon competitive imported products. We held the paragraph to be an exercise of constitutional power by the Congress.

We have already, in another connection, called attention to Field v. Clark, 143 U. S. 649, and Buttfield v. Stranahan, 192 U. S. 470. It is only necessary at this time to point out that, in both cases, particularly the former, the very broad latitude given to the executive equaled, if it did not much exceed, that claimed to be given by the statute before us. It would be quite difficult to conceive of a greater range of authority than that found in Field v. Clark, where the Chief Executive was emplowered to take certain imports from the free list and place them upon a dutiable list, when "he was satisfied" that duties were being imposed by some country upon our exports, which "he may deem to be

reciprocally unequal and unreasonable." In other words, under the statute in the Field case the President was empowered to make goods dutiable by removing them from the free list. No attempt was there made as in the statute before us now, to name any elements which the President might make use of in arriving at a finding of fact. It is contended that the Field case, supra, differs from the one at bar here, in that in the Field case, specific rates of duty were named in the act to take effect upon the issuance of the President's proclamation, and here the rate is to be fixed by the President. We are unable to perceive the difference. In each case, the effort of Congress was to protect products of the United States which might be threatened by injurious competitive products from abroad—in one case by unfair governmental methods, in the other by differing business conditions. The important thing in each case was that an amount of duty be imposed, sufficient for the protection of the threatened industry. It cannot be concluded that naming the rate in the Field case and directing the Executive to compute it in the case at bar make that law constitutional and this one unconstitutional. The Constitution, in conferring upon the Congress the power to "lay and collect * * * duties," does not declare, even by implication, that the Congress must exercise the power thus given to it by naming in specific terms the rate of duty to be applied. When it appears that the power to lay duties has been given to the Congress without reservation, we may [fol. 92] safely conclude that the way in which that power shall be exercised is left to its discretion. As was well said by the great Chief Justice in McCulloch v. Maryland, 4 Wheat. 315:

But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.

See also Osborn v. United States Bank, 9, Wheat. 737, and Murray's Lessee et al. v. Hoboken, etc., 18 How. 272 (281).

Whether the particular statute before us is wise or unwise is not for our consideration. This is a political ques-

tion, with which courts will not deal. The cure for an unwise and injudicious exercise of its constitutional powers by the Congress lies with the people, from whom its members derive their commissions. Springer v. United States, 102 U. S. 586; Kuttroff, Pickhardt & Co. v. United States, 12 Ct. Cust. Appls. 299 (304); McCray v. United States, 195 U. S. 27 (54); Flint v. Stone, Tracy Co., 220 U. S. 107 (169).

The statements of many persons are cited, some of whom are present or past members of the United States Tariff Commission, to the effect that it is impossible to precisely establish the cost of production of an article. This may be conceded. It is likewise impossible to ascertain, aside from the realm of mathematics, with scientific accuracy, most of the things upon which our lives and human governments depend. At most, we must be content with a reasonable accuracy, and this, we believe, is all that is required in the administration of the law now before us. As was said in Cramer v. Arthur, 102 U. S. 612 (617), a case involving the conversion of currency:

> The Government gets at the truth, as near as it can, and proclaims it.

And in Patton v. Brady, Executrix, 184 U. S. 608 (622), in commenting upon the uniformity clause in Sec. 8, Art. I of the Constitution:

> Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once.

We are, therefore, of the opinion that section 315 is not so uncertain of administration as to amount to a delegation of legislative power to the Chief Executive, but is, in that respect, a valid exercise of the constitutional power of the Congress.

It is next contended by appellant that the President cannot be haled into court and sued by a citizen; that his acts under section 315 are not reviewable by the courts; that the acts of an administrative officer exercising delegated [fol. 93] power must, if they are to be held valid, always be so subject to review; and that the President may under this section, practically rewrite a tariff law in form and in substance, without accountability to anyone. If this be

true, it goes without saying that the section can not be sustained. But we can not agree with either the premises or the conclusion. The office of President is one of high standing and vast responsibility; public policy requires, and the courts have uniformly held, that, in the discharge of his high office, in all those matters which have been entrusted to his discretion, he is not to be interfered with or under the control of the courts. Such powers are political in their nature and for the proper exercise of these the President is responsible only to the country. The power of the President to appoint diplomatic representatives, members of the judiciary, and subordinate officials, to negotiate treaties, to control and direct the activities of the Army and Navy, to supervise foreign relations, and to recommend and veto acts of the legislative branch of the Government, are patent examples of such powers. In the execution of such powers, the President may act unwisely and to the great injury of individual and national interests, but for such acts there can be no remedy, under our Constitution, but the political one committed to the suffrage of the people. But when duties are imposed upon the President over and beyond his purely political ones, duties which he does not perform because of his constitutional power as Chief Executive but because the Congress has constituted him an agent for the better execution of some legislative policy, and in the execution of which powers personal or property rights are involved, then such acts are ministerial only, and are subject to review by the courts. Or, as was better said by Chief Justice Marshall in Marbury v. Madison, 1 Cranch 137 (166), speaking of the Secretary of State:

> But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others.

This conclusion finds further support in the following authorities: State of Mississippi v. Johnson, 4 Wall. 475 (500); Morrill v. Jones, 106 U. S. 466; Webster v. Luther, 163 U. S. 331 (342); United States v. Wong Kim Ark, 169 U. S. 649 (694); American School of Mag. Healing v.

McAnnulty, 187 U. S. 94 (110); Burfenning v. C. St. P. etc., Ry., 163 U. S. 321 (323); Monogahela Bridge v. United States, 216 U. S. 177 (195).

It is probable that the Congress conferred upon the President this grant of power with the idea that, because of the [fol. 94] great publicity attending the acts of the Chief Executive and his great responsibility to the people, there would be less likelihood of precipitate and illadvised action, and greater dignity and standing would attend the accomplished act. But whatever the legislative purpose may have been, the acts of the President thereunder are entitled to no greater significance and should be measured by no other rule than that to be given and used in considering the acts of any other fact-finding official or board which the Congress may have named.

The law is not concerned as to the identity or official standing of the person who shall perform the duties required, but regards only the powers which are granted and the things which may be done as a result of such grant. An analysis of section 315 discloses that the President is not therein given any discretion as to what he shall do, but only as to how he shall do it. We have hereinbefore set out at some length the powers granted by the section, and it is not necessary to recount them again. It will suffice to say that the powers granted to the President by the section are circumscribed within narrow bounds. Under subsection (a) he may increase or decrease the rate or change a classification, but only to the extent necessary to accomplish the purpose of the Congress, and then not more or less than 50 per centum of the rates specified in the act. He may not change the classification of a dutiable article from the free list to the dutiable list or vice versa, or from a specific to an ad valorem rate, or vice versa. Under subsection (b) he can not decrease an ad valorem rate more than 50 per centum of the rate specified in the statute, and he cannot increase such rate. He can take no action under this section without a prior investigation by the United States Tariff Commission. He must proclaim a change back to the rate specified in the statute when the emergency is at an end. If, in case of any duty provision specified in the statute, the President has not proclaimed a change of rate or classification as provided in section 315, it must be presumed, as a matter of law, and agreeably to the familiar

doctrine that every public official must be assumed, in the absence of proof to the contrary, to have performed his duties in pursuance to law, that, as to such rate, the President has not found that such changes are necessary to equalize the differences in cost of production in the United States and the principal competing country. The first announcement of a finding requiring such a change in duty is the proclamation to be issued by the President. Until such proclamation has been issued, the President may not, under this statute, be coerced or controlled by the mandates of the courts.

But when, in the performance of his duties, under this section, the President proclaims a change of duty, if in so doing, he acts beyond the law or fails to comply with its express mandates, then we cannot doubt that the person [fol. 95] aggrieved thereby may find adequate relief in the courts. We need not go beyond the case at bar for an illustration of this. Here the importer has protested against the imposition of additional duties because of the alleged unconstitutionality of the act under which it was imposed, and upon that claim he is entitled to a proper hearing in the courts. Can it be denied that if, in the imposition of this rate of duty, the President had proceeded without taking the steps directed by section 315, the importer could have set these facts out in his protest and had an adjudication thereon? To deny this would be to give to the act of the President a peculiar sanctity and inviolability not attaching to the acts of other officials of the Government performing similar fact-finding duties; and this we are neither called upon to do nor justified by the law in doing. We are unable to see why any different rule of law should be applied to the President's finding of facts under section 315 than the one applied to the finding of valuation by an appraiser of merchandise at our ports. In such cases, while the courts have held the finding of valuation made by the appraiser to be conclusive, if he proceeds upon a wrong principle, contrary to law, his acts are subject to judicial control and correction. Badger v. Cusimano, 130 U. S. 39; Robertson v. Frank Bros. Co., 132 U. S. 17 (24); Muser v. Magone, 155 U. S. 240 (247); United States v. Passavant, 169 U. S. 16 (21).

We are, therefore, unable to agree with this contention made by appellant.

Finally, it is argued that section 315 discloses that its primary and only purpose is the protection of the industries of the United States and not the raising of revenue for governmental purposes; that the section, in effect, proposes to take from the pockets of the taxpayers, moneys with which to protect a favored class, and that the Congress has no constitutional power to so legislate.

The Tariff Act of 1922 is entitled "An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes." 42 Stat. 941, 942. In each of the subsections (a) and (b) of section 315 the preamble is "That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended," and in each the preamble is followed by a recital that this policy is to levy duties, within certain prescribed limits, sufficient to equalize the differences in costs of production in the United States and the principal competing foreign countries. This appears plainly to be an effort to afford protection to certain industries of the United States. But must this protection be considered as the sole and only reason for the legislation, or as a purpose incidental to its revenue provisions? We believe the [fol. 96] latter view should obtain. The Constitution gives to the legislative branch of our Government the right to levy taxes and duties. Aside from the constitutional inhibition against taxes on exports and the requirement of uniformity in indirect taxes and proportion in direct taxes, the power to impose such taxes and duties was given without reservations. How or when they may be imposed are political questions. Lane County v. Oregon, 7 Wall. 71 (77-79); Loan Assn. v. Topeka, 20 Wall. 655 (663). It therefore frequently occurs that taxes or duties are imposed which have a double purpose of revenue and other purpose thought to be for the public welfare. In such cases the courts have usually held the revenue purpose to be controlling and the public-welfare purpose to be incidental only. A case in point is In re Kollock, 165 U. S. 526. There Kollock was indicted and convicted for a violation of the oleomargarine act of August 2, 1886, 24 Stat. 209, ch. 840. That act fixed certain taxes to be paid by manu-

facturers and dealers in oleomargarine, and provided generally for the conduct of such business. Appellant contended the act was a penal statute, that it delegated the power to the commissioner to define the crime, and was hence invalid. The Supreme Court said:

The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue.

In United States v. Doremus, 249 U. S. 86, the constitutionality of the narcotic drug act of December 17, 1914, 38 Stat. 785, was assailed. The court, in sustaining the constitutionality of this act under Article I, section 8, of the Constitution, said:

And from an early day the court has held that the fact that other motives may impel the exercise of Federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it can not be invalidated because of the supposed motives which induced it.

In the Child Labor Tax Case, 259 U. S. 20, the court, while holding the particular statute before it to be invalid, recognized and reiterated the doctrine announced in the above cases, in these words:

Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive.

The statute before us here does not appear to be subject to the objections which influenced the judgment of the court in the Child Labor Case, supra. Section 315 is a part of a comprehensive and complete revenue measure, and, although the purpose of protection to domestic industries is plainly evident therein, this purpose must, we believe, in harmony with the authorities cited, be held to be one incidental to the primary purpose of revenue.

[fol. 97] If, however, section 315 may be considered merely as a measure for the protection of domestic industries, and not as a revenue measure, it is argued by the Government that, as such, it is a valid exercise of the power granted to Congress in Article I, section 8:

> The Congress shall have power * * * to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

As has already been noted, both the title of the Tariff Act of 1922 and the text of section 315 recite that one of the purposes of said act and section is to regulate the foreign commerce of the United States. The congressional intent is therefore plainly evident. But is the levying of discriminatory duties upon certain classes of imports in order to protect and encourage certain domestic industries a proper exercise of the constitutional grant of power to regulate commerce? This raises a question of much nicety but one which, we think, may be answered by reference to a line of legislative enactments and judicial pronouncements extending back into the earliest periods of the existence of our Government.

Section 1 of the tariff act of July 4, 1789, 1 Stat. 24, the first tariff act enacted by the Congress of the United States, contained this preamble:

> Whereas it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufacturers, that duties be laid on goods, wares and merchandises imported:

Following this act, a legislative policy of protection for the shipping and industries of the United States began, a policy which has continued through every general tariff revision act, and in many customs administration and other acts, from that time to the present. Many of these acts, for convenience in reference, are enumerated in the margin.[1] For 138 years this legislative practice has per-

---

[1] Sec. 5, act of July 4, 1789 (1 Stat. 24); secs. 2, 3, and 4, act of Aug. 10, 1790 (1 Stat. 180); sec. 51, act of Mar. 3, 1791 (1 Stat. 210); sec. 3, tariff act of Mar. 27, 1804 (2 Stat. 299); sec. 4, tariff act of Apr. 27, 1816 (3 Stat. 313); sec. 1, tariff act of May 6, 1822 (3 Stat. 681); sec. 4, act of Jun. 7, 1824 (4 Stat. 3); sec. 3, act of Apr. 20, 1826 (4 Stat. 154); act of May 9, 1828 (4 Stat. 269); sec. 1, act of May 24, 1828 (4 Stat. 308); act of May 29,

sisted unchallenged and apparently with the approval of the people. While we do not wish to be understood as holding that such a legislative practice is in itself conclusive as to the constitutionality of a measure framed along such lines, or that continued legislative practice can make constitutional that which is clearly unconstitutional, yet a legislative practice of such long continuance (some of which is [fol. 98] contemporaneous with the Constitution) and so well understood and tacitly agreed to, must be given great weight in determining the validity of a legislative enactment the constitutionality of which is thought to be doubtful; and such has been the uniform holding of our courts. Stuart v. Laird, 1 Cranch, 299 (309); Waring v. Clarke, 5 How. 440 (458); Cooley v. Philadelphia, 12 How. 299 (315); Veazie Bank v. Fenno, 8 Wall. 533 (544); Ames v. Kansas, 111 U. S. 449 (469); Field v. Clark, supra, 683; McPherson v. Blacker, 146 U. S. 1 (27); Fairbank v. United States, 181 U. S. 283 (307); McGrain v. Daugherty, — U. S. —, decided January 17, 1927.

The scope and extent of the congressional power to regulate commerce has received the frequent consideration of the Supreme Court of the United States. A brief reference will be made to some of the cases.

Gibbons v. Ogden, 9 Wheat. 1, the leading case on the subject, concerned an alleged exclusive franchise for navigating certain waters of the State of New York. In that case it was pointed out (pp. 200-202) that the act of laying duties on imports must be considered primarily as a branch of the taxing power as given by section 8, Article I, of the Constitution. But it was also observed:

It is true, that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed, with a view to revenue;

Russell v. Williams, 106 U. S. 623, dealt with certain imports from China, subjected to an additional 10 per centum

1830 (4 Stat. 419); sec. 1, act of May 29, 1830 (4 Stat. 419); sec. 3, act of July 13, 1832 (4 Stat. 579); sec. 1, act of July 14, 1832 (4 Stat. 604); act of Mar. 3, 1845 (5 Stat. 748); secs. 1 and 4, act of Mar. 1, 1873 (17 Stat. 482); sec. 3, and par. 231, sec. 17, act of Oct. 1, 1890 (26 Stat. 567); secs. 21 and 22, tariff act of Aug. 27, 1894 (28 Stat. 551); title and sec. 4, tariff act of July 24, 1897 (30 Stat. 151); title and secs. 2, 4, and 6, tariff act of Aug. 5, 1909 (36 Stat. 11); Sec. IV, A and E, tariff act of Oct. 3, 1913 (38 Stat. 192).

ad valorem duty under section 6 of the tariff act of March 3, 1865, which provided such an additional duty upon any merchandise imported from any place east of the Cape of Good Hope. The court held that this provision of the law was intended to be, and was, a regulation of commerce under the constitutional provision cited.

In Buttfield v. Stranahan, supra, the court, in discussing the tea inspection act of March 2, 1897, 29 Stat. 604, said:

The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. * * * it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation.

On numerous occasions acts of Congress declaring embargoes either directly or by proclamation of the President, have been sustained as a valid exercise of its constitutional power to regulate commerce. The Brig Aurora, supra; State of Pennsylvania v. Wheeling and B. Bridge Co., 18 [fol. 99] How. 421. In the case last cited it was said (439):

During the existence of the embargo, in the year 1808, it was contended that, under the commercial power, an embargo could not be imposed, as it destroyed commerce. But it was held otherwise; so that the constitutionality of a regulation of commerce by Congress does not depend upon the policy and justice of such an act, but generally upon its discretion.

In Leisy v. Hardin, 135 U. S. 100, Mr. Chief Justice Fuller said for the court (116):

And Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted and what excluded.

To the same effect are Field v. Clark, supra, and The Abby Dodge, 223 U. S. 166 (176).

In the celebrated case of Brown v. Maryland, 12 Wheat. 419, the court, after observing that commerce is intercourse, stated:

It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete should cease at the point when its continuance is indispensable to its value. * * * Congress has a right, not only to authorize importation, but to authorize the importer to sell.

The act of February 13, 1862, 12 Stat. 338, prohibited the sale of spirituous liquors to certain Indians. The Supreme Court, in United States v. Holliday, 3 Wall. 407 (417), held the act valid as a regulation of commerce. In Case of the State Freight Tax, 15 Wall. 232, the court quotes with approval the definition given by Judge Story of the word "commerce," as used in the Constitution:

Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufacturers, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight.

In Henderson v. Mayor of New York, 92 U. S. 259, and in Oceanic Steam Navigation Co. v. Stranahan, 214 U. S. 320 (334), the regulation of foreign immigration was held to be within the congressional power to regulate commerce. The power to build or encourage interstate railways and highways was sustained as a proper exercise of that power in California v. Pac. R. R. Co., 127 U. S. 1 (39).

Reference is also had to the Lottery Case, 188 U. S. 321 (359), sustaining the anti-lottery act of March 2, 1895, 28 Stat. 963, and Hoke and Economides v. United States, 227 U. S. 308 (323), sustaining the validity of the Mann Act of June 25, 1910, 36 Stat. 825.

In Hammer v. Dagenhart, 247 U. S. 251, the constitutionality of the child labor act of September 1, 1916, 39 Stat. 675, was involved. The statute was held not to be a regu- [fol. 100] lation of interstate commerce. The court there observed that there were special reasons, based upon public policy, which led to the conclusion in Hoke v. United States, supra, and other similar cases, which do not ob-

tain in ordinary commercial intercourse. It was, however, reiterated that Congress had ample power to regulate commerce, except wherein it might attempt to assume a jurisdiction of the States, reserved and not granted by the Constitution.

The rule, we believe, to be gathered from the cases cited, when read in the light of the later announcement in Hammer v. Dagenhart, supra, and with due consideration for the perpetuation of our dual system of national and state governments, may be stated thus:

In foreign commerce, the power to regulate includes the right to levy discriminatory duties and the right to prohibit; and this legislative right is absolute.

In interstate commerce the right to regulate includes the right to prohibit when the character of the traffic prohibited is such as to require prohibition for the public welfare. In such cases the test is always the character of the act prohibited. Where there is no reasonable ground for the prohibition, resulting from a public necessity, such prohibition of commerce will not be upheld.

In Houston, East & West Texas Ry. v. United States, 234 U. S. 342 (351), the court in discussing the constitutional power of Congress to regulate commerce, said:

Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement" (The Daniel Ball, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (County of Mobile v. Kimball, supra); "to foster, protect, control and restrain."

Again, in Dayton-Goose Creek Railway v. United States, 263 U. S. 456 (478), it was said:

This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety.

While the last two cases cited dealt with questions of interstate commerce, no reason is apparent why the same conclusions should not be reached in matters pertaining to foreign commerce, the constitutional grant of power as to each being incorporated in the same language.

From a consideration of these authorities, together with the evident purpose of the Congress as expressed in the act before us, section 315, imposing sufficient duties upon imported products to equalize the difference in cost of production in the United States and the principal competing country, is a valid exercise of the constitutional grant of power to the Congress to regulate commerce. It was for [fol. 101] the Congress to select the means by which it thought the best interests of the country would be served in encouraging, fostering, and protecting the commerce and industries of the country. Having done so within constitutional limits, the courts will not interfere. If it be said that legislation which thus protects one industry at the expense of others should be declared invalid therefor, then we must deny to the Congress the power to lay any duties at all. The power to lay duties implies the power to select the objects upon which such duties are laid. Necessarily, the laying of a duty upon one product and not upon another may give added advantage or disadvantage to the domestic producer of the product thus made dutiable. But what might be said of the inequality of the laying of duties may also be said of all taxes laid for public purposes. The needs occasioned by drought, famine, pestilence, and flood, the pauper, the dependent, and the criminal, are burdens unequally borne; and yet, while the means of one citizen are taken from him to minister to another, it is still deemed to be a public purpose, the benefits of which all citizens equally enjoy. The right of our National Legislature to take such steps as the people, acting through it, may think best suited to protect, foster, and encourage its commerce and industrial life cannot be denied; for to so deny it would be to deny the sovereign right which every properly constituted government has to perpetuate itself and to accomplish one of the chief purposes for which it was created.

It is apparent, from the facts hereinbefore recited and the discussion had, that the single question presented for determination is, whether Congress, in attempting to grant

to the President the power to increase the rates of duty specified in the statute by adding thereto the differences in cost of production ascertained by him under section 315 (a), acted within constitutional limits, or whether such act was in that respect, null and void; and our decision is limited to that precise question.

We find no error in the record and the judgment of the court below is affirmed.

Affirmed.

[fol. 102] In United States Court of Customs Appeals

No. 2761

[Title omitted]

Judgment—February 24, 1927

Said appeal having heretofore been brought on to be heard before the court and due consideration thereon having been had, it is

Ordered that the judgment of the Board of United States General Appraisers, now the United States Customs Court, be, and the same is hereby, affirmed.

* * * * * * *

(Signed) William J. Graham, Presiding Judge.

In United States Court of Customs Appeals

Certificate re Mandate

The final mandate, consisting of a certified copy of the above order of the Court, of the 24th day of February, 1927, was issued to the United States Customs Court on the 26th day of March, 1927.

Arthur B. Shelton, Clerk.

[fol. 103] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 104] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 6, 1927

The petition herein for a writ of certiorari to the United Court of Customs Appeals is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 6, 1927.

Endorsed on cover: File No. 32,682. U. S. Court of Customs Appeals. Term No. 242. J. W. Hampton, Jr., & Co., petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed May 10th, 1927. File No. 32,682.

(6509)

End

INDEX.

	Page
Petition:	
Statement	2
Question presented	3
Statutes involved	4
Reasons for granting writ	9
Brief	11
Appendix:	
Thomas Walker Page	21
Thomas O. Marvin	37
F. W. Taussig	38
Philip G. Wright	39
President Coolidge	40
President Taft	42
The U. S. Tariff Commission's report on wheat and wheat products	43

Table of Cases Cited.

United States v. Lippman, 260 U. S., 742	2

Constitutions and Statutes Cited.

Constitution of the United States, Art. I, Sec. I	3, 13
Art. I, Sec. VIII	3, 13
Art. III, Sec. II	1
Judicial Code, Sec. 195 (36 Stat., 1145), as amended August 22, 1914, C. 267 (38 Stat., 703), as amended September 6, 1916, Sec. 6 (39 Stat., 726, 727)	1
Tariff Act of September 21, 1922 (42 Stat., 358, 941, 860), and Sec. 315	2, 4, 11, 19

—5933

J51525

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1115

J. W. HAMPTON, JR., & CO., PETITIONER,

v.

THE UNITED STATES, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS AND BRIEF IN SUPPORT THEREOF.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Customs Appeals in the above-entitled cause, rendered February 24, 1927 (R., 102); mandate March 26, 1927 (R., 102).

The petitioner relies on Art. III, Sec. II, Constitution, and Section 195 (36 Stat., 1145) of the Judicial Code, as amended August 22, 1914, c. 267 (38 Stat., 703), as amended September 6, 1916, Sec. 6 (39 Stat.,

726, 727). Note United States *v.* Lippmann, 260 U. S., 742.

On October 16, 1926, prior to the decision of the U. S. Court of Customs Appeals, the Attorney General filed with the clerk of said court a certificate provided for in Section 195, certifying that in his opinion this case is of such importance as to render expedient its review by the Supreme Court (R., 76).

Summary.—Statement.

This case squarely and correctly raises the constitutionality of Sec. 315 of the Tariff Act of September 21, 1922 (42 Stat., 358, 941). This is the so-called flexible-tariff provision. There is a monetary interest involved to recover duties paid to a collector of customs (New York, N. Y.), who assessed by virtue of the proclamation of the President (R., 15), (45 Treas. Dec. 669, T. D. 40216, R., 79), which raised the statutory rate of four (4) cents per pound (par. 12, 42 Stat., 860) on barium dioxide to six (6) cents per pound.

Protest and appeal were made (Sec. 514, Part 3, Title IV, 42 Stat., 969/70), and the case came on for trial before the Board of United States General Appraisers (now the United States Customs Court (44 Stat., 669, c. 411, Secs. 1, 2, Part 1, 49 Treas. Dec., 943, T. D. 41616).

A majority held the act constitutional (R., 12; dissent R., 44). Thereafter, on appeal to the United States Court of Customs Appeals, the lower court was affirmed (R., 102).

Question Presented.

The protest (R., 8, 9), set up the following:

> "We claim that the merchandise is properly dutiable at four (4) cents per pound, under paragraph 12, of the Tariff Act of September 21, 1922.
>
> "We further claim that if the assessment and liquidation of duty is purposed to be made by authority of the President under section 315, etc., Title III, of said act, it is unconstitutional and void; that the President's proclamation dated May 19, 1924, T. D. 40216, is unconstitutional and void:
>
> "(1) Because it is done under and by virtue of an illegal delegation to the Executive Department of the power to legislate, which power, by the Federal Constitution, is solely committed to Congress.
>
> Article I.
>
> "SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."
>
> "(2) Because it is done under an illegal delegation to the Executive Department of the power to tax, which power is alone lodged in the Congress of the United States by
>
> "SECTION 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, * * *."

"(3) Even if in form it has been done by constitutional delegation of legislative power and of the taxing power, it purports on its face to make a levy, not for raising public revenue, but under a declared policy for protection to American industries, based upon difference of cost of production at home and abroad, which is not a tax or duty within the meaning of the Federal Constitution.

"We further claim that your action and decision, the acts of the Tariff Commission, and the act of the President of the United States, are singly, and collectively, null and void, being unconstitutional; that is to say, being contrary to the express provisions of the Federal Constitution and the specific grants of power bestowed only and contained in said Constitution."

Statutes Involved.

Tariff Act of September, 1922, Title I, par. 12 (42 Stat., 860):

"* * *; barium dioxide, 4 cents per pound, * * *."

Title III, Sec. 315 (42 Stat., 358, 941):

SEC. 315 (*a*). That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product or competing foreign coun-

tries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, that the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(*b*) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in cost of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the

said differences in costs of production in the United States and the principal competing country cannot be equalized by proceeding under the provisions of subdivision (*a*) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the *ad valorem* duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (*f*) of section 402 of this Act of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (*b*) of this section.

The *ad valorem* rate or rates of duty based up such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine

Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraph (1), (2), and (3) of subdivision (*a*) of section 402 of this Act.

(*c*) That in ascertaining the differences in costs of production under the provisions of subdivisions (*a*) and (*b*) of this section, the President in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evi-

dence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified *ad valorem* rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum *ad valorem* rate so specified.

(*d*) For the purposes of this section any coal-tar product provided for in paragraphs 27 or 28 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results substantially equal to those accomplished by the domestic product when used in substantially the same manner.

(*e*) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

(*f*) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported articles of the class or kind of

articles upon which the President has made a proclamation under the provisions of subdivision (*b*) of this section and for the form of invoice required at time of entry.

(Note that by changing from the foreign market value to the United States value, the increase would be more than 50 per cent, perhaps as much as 200 or 300 per cent.)

Reasons for Granting Writ.

A. The case raises the constitutionality of an act of Congress.

B. It challenges the legality of delegation of the power to tax, which is the power to destroy.

C. That never in our history has the power been given to a delegee, to fix, change, and amend a rate of duty, much less the entire dutiable schedule of a tariff act. This is a power, not only to change the rate, but the classification. Such is purely legislative.

D. (1) That the cost of production cannot be found; (2) That the section bestows upon the President the power to use discretion, opinion, estimation, guess, and judgment; (3) That under the section he cannot find the fact.

E. That this scheme of tariff taxation is revolutionary; destroys the primary constitutional safeguard to liberty and property, which limits to Congress alone the power to fix the amount of a future tax.

F. It provides for a levy, which appears on the face of the statute, for trade advantage to particular citizens and cannot be called a tax laid for the "common defense and general welfare."

G. It is not subject to judicial review because it concerns the purely legislative act of fixing the amount of a future tax.

H. The opinion of the Court of Customs Appeals fails to distinguish the cases cited by it which dealt with interstate commerce, navigation, bankruptcy, health, pure food, immigration, morals, war and countervailing or compensatory-retaliatory duty—reciprocity; the delegation being based on, and being accounted for, by the reason that it was *impracticable to handle the thing in any other way.* Congress has been passing tariff acts since the beginning of our Federal Government.

I. Because the section consolidates the judicial, legislative and administrative.

K. Because the Court of Customs Appeals holds in effect, that fixing the future tax rate is the same as appraisement of a parcel of merchandise from one factory exported on a day certain.

Therefore, it is prayed and respectfully submitted that for these reasons the petition be granted.

WALTER EVANS HAMPTON,
Counsel for J. W. Hampton, Jr., & Co.

NEW YORK, N. Y., *May* 6, 1927.

BRIEF IN SUPPORT OF PETITION.

The opinion of the United States Court of Customs Appeals is found in (R., 77) 14 Ct. Cust. Appls., — T. D. 42030, 51 Treas. Dec. 10, p. 41.

The statute which is relied on is the Tariff Act of September, 1922, Par. 12 (42 Stat., 860), Title I, and Sec. 315, Title III (42 Stat., 358, 941).

I.

In this case we challenge the constitutionality of the so-called Flexible Tariff, as embodied in Section 315, of the Tariff Act of September 21, 1922, as taxation by executive fiat; hitherto unknown in our history and expressly forbidden by the Constitution.

We challenge the alleged standard on which it purports to be based—difference in cost of production at home and abroad—as no standard at all, as incapable of definite ascertainment, the result depending on the will and inclination of the President; as involving executive discretion and judgment at every stage of a complicated, confused and involved process. Consequently the alleged finding under it necessarily becomes a mere discretionary guess—a decision between different results in order to fix the amount of the equalizing tax. That is the exercise of the very essence of the legislative trust, and of the power to fix the tax rate committed by the people to Congress alone.

We note here that in determining the difference in cost of production at home and abroad the President may consider "*any other advantages or disadvantages*

in competition." This is not related to difference in cost of production—has nothing to do with it. Yet it has been cited and presumably used in every proclamation issued by the President.

If a finding can be made on "*any other advantages or disadvantages in competition,*" then no argument is necessary to show the unconstitutionality of this act. Every one admits, and must admit, that an executive finding of a tariff rate based upon the *differences between all advantages and disadvantages in competition,* is purely an act of legislation and, therefore, unconstitutional.

Congress itself admitted it when it amended this very scheme as first proposed, for executive fixing of tariff rates upon the *differences in advantages and disadvantages in competition at home and abroad,* and substituted *differences in cost of production* at home and abroad (Con. Rec., pp. 12188, 12190, Aug. 10, 1922). There was a fight, however, and the radical advocates of this delegation successfully insisted on the absurdity, as embodied in subdivision (*c*) of Sec. 315, that the President should still use "any other advantages or disadvantages in competition" in finding the difference in cost of production at home and abroad (Con. Rec., p. 12190, Aug. 10, 1922).

This Court must declare the section (315) unconstitutional as an illegal delegation, because executive fixing of tariff rates, based on the difference in advantages or disadvantages in competition, is plainly and unmistakably on its face an illegal delegation of legislative power and taxing power, irrespective of the

claimed legality of a finding based on differences in cost of production.

We assert that when the executive fixes the amount of the future tax rate (under and within the limits provided by Sec. 315) he taxes the citizen; he legislates for the people; he exercises the power to destroy. If exercised within those limits no court can review his act; nor stop it because confiscatory; nor examine it to see if it is based upon legally sufficient evidence; nor quash it if flatly contrary to all the evidence, *i. e.*—an arbitrary fiat; or because it ignores the Tariff Commission's finding (as has already come to pass); nor enquire into his motives or good faith in acting or failing to act. It does not involve a justiciable subject matter. The courts can not fix the future tax rates, nor review the discretion which such determination necessarily involves. It is not subject to judicial review, because it consists of the purely legislative act of fixing the amount of a future tax, *i. e.*—the purely political act of levying a new tax.

If Section (315) is constitutional, the express constitutional prohibitions confining the power of legislation, and particularly the power of taxation, to the people's representatives are completely broken down. All lines of demarkation between legislative powers and executive powers are forever removed. Such distinction becomes a mere play on words. Such a holding as made by the court below completely nullifies the language of Section I, of Article 1, and Section 8, of Article 1, of the Constitution. Such a holding authorizes and invites Congress to pass its entire responsibility

over the levy of taxation to an irresponsible bureaucracy which before this act had not yet invaded this field; which, up to this, has never been commissioned to fix the amount of the tax rate; either for customs taxes, income taxes, inheritance taxes, or any other taxes. The principle here involved necessarily affects all taxation as well as customs taxation. If the door of this attempted delegation is opened for one kind of taxation, it is opened for all.

The court below, by its ruling, cheerfully gives blanket authority to Congress to abdicate its entire trust over this power to destroy, by merely declaring a few general principles of taxation; one for customs, another for income tax, another for inheritance tax, etc., leaving the bureaucracy to do the rest.

If the court below is sustained, Congress can commit the ascertainment of the actual rate of every tax the citizen must pay, on income, on inheritance, on customs, on everything, to the choice, judgment, and discretion of executive functionaries.

This is the revolution in the American system of taxation for which this so-called flexible tariff opens the door. From that conclusion there is no escape.

Judge Brown, of the trial court, in his dissenting opinion, points out a number of patent instances, as shown by the Tariff Commission's Reports, of the necessary exercise of judgment and discretion leading to different results in making findings of foreign and domestic cost difference. They have actually decided:

> (1) What area (if not the whole United States) they shall cover to compare with the

competing Canadian section in the production of, say, hard spring wheat, and whether winter wheat shall be included in the investigation; the tariff rate applying to all wheat?

(2) Whether costs of one current year should be compared or an average over a period of years, say three, taken for comparison.

(3) Whether transportation costs of the foreign and domestic articles to a common market place should be included or excluded from costs of production.

(NOTE.—If transportation costs to a common market place can be considered, which shall be chosen as between the differing cost of transporting goods, say to a common market in New York, from producers located in Texas, California, Michigan, and Maine. An attempt at averaging these would necessarily be arbitrary and plainly lie in discretion. No averaging would satisfy the long-haul producer. If there happens to be more than one common market place, the difficulty, uncertainty, and hence the discretion, increases.)

(4) Whether the difference between foreign and domestic costs should be measured between points representing a weighted average cost in the two countries, respectively, or at a point representing a cost at or below which the bulk of the American product is produced.

(5) Whether land in the competitive area investigated to determine an agricultural duty should be taken at its rental value or as for a fair return at interest upon its capital value.

(6) What division of costs shall be apportioned between principal and by-products, shown by Page, to be necessarily arbitrary.

(7) The readjustment *vel non* of actual costs to an estimated production equivalent to a given percentage of plant capacity.

After citing these actual decisions Judge Brown says:

"The result of any attempt to choose any method or rule whatsoever for averaging the costs of many different producers, whether based upon 'a weighted average cost' or upon a 'bulk line production cost' or upon any other so-called scientific method, necessarily becomes a mere discretionary guess, *i. e.*, a question of where we choose to draw the line. The final figure arrived at manifestly must depend upon the particular method of averaging which is selected. A method does not become accurate, and its result becomes certain, by merely giving the process a scientific name. A dream does not become a reality through descriptive terminology. A guess does not become a fact by calling it a finding.

* * * * * * *

"Any generalization from such varying factors, however intelligently and painstakingly arrived at by executive authority, must, in the nature of the case, be largely a matter of individual opinion and judgment. As all the factors which make up the finding are themselves variable and uncertain it is impossible that the generalization from them could attain to greater

certainty or be any more than a rough approximation like the finding of damages, in tort, by a jury."

There is absolutely no governmental necessity for the attempted delegation of customs taxation. Congress, without such attempt at abdicating its functions, has itself fixed the rate of all tariff taxes, and of all other Federal taxes, since the formation of our general Government. The excuse cannot be advanced here, as in delegations under the commerce clause (all of which are subject to judicial review for confiscation or arbitrary action), that the wheels of Government will stop if this congressional abdication of power and responsibility is not permitted. That claim is completely negatived by the rates actually fixed in the dutiable paragraphs of this very act, and all other tariff acts previously passed by Congress, during peace and war, from the beginning.

This is a case of first impression. Section 315, in the breadth and radical scope of its attempted delegation, is totally unlike any legislation heretofore passed by Congress. It is pregnant with dangerous new possibilities, changing the whole future course of our constitutional history. Nothing approaching it, or similar to it, has heretofore been attempted.

This, we submit, demonstrates the importance of this case, and the necessity of a review before this Court, of the far-reaching constitutional question here involved.

Therefore we ask that a writ of certiorari be granted to review the revolutionary holding of the United States Court of Customs Appeals; to the end that we may present to this, our Supreme Court, created for the purpose of defending our Charter of Liberty from all assaults of its enemies, oral argument and brief to show the unconstitutionality of this dangerous and revolutionary attempt to destroy our primary constitutional safeguard to liberty and property, which limits to the Congress alone the power to fix the amount of the future tax rate.

We print as an appendix to this brief conclusive statements from distinguished economists and statesmen; some of them engaged in the actual operation of this law (and there are none to the contrary) showing that the finding which this Section 315 directs, of the alleged difference in cost of production at home and abroad, cannot be made *without the exercise of discretion, choice* and *judgment* in using or discarding different factors, *in deciding between different results.* That is the legislative act of fixing the amount of the future tax rate which the Constitution forbids the Executive to do.

II.

Another and separate question also of first impression, never before litigated, or possible to be litigated, is involved in this case, which, in itself, we submit, requires its review by this Court on certiorari.

Never before, in 135 years, has Congress (as hereby provided in said Section 315), avowedly, *on the face*

of the law itself, undisguised, made a levy frankly for "protection," without respect to, or consideration of "revenue." This we attack as an attempt to tax for a private purpose and not for the "general welfare."

The question is, whether a levy can be made, not ostensibly for revenue, thus placing the motives of Congress beyond judicial inquiry, but frankly and on the face of the statute for a trade advantage to particular citizens (any revenue raised therefrom being merely incidental or accidental) and still be called a *tax* laid for the "common defense and general welfare."

The rate of 4 cents per pound upon barium dioxide, fixed by the Congress itself, in the Act of 1922, is laid in the familiar form used for the purpose of raising revenue (whatever its incidental effect) since the formation of our present Federal Government. The legality of that rate so levied cannot be contested. To permit the courts to take proof of its effect, and inquire into the motives of Congress in levying a duty in that form, would upset the Government and transfer power over legislation and over taxation to the judicial branch. The additional 2 cents per pound, however, is expressly stated in Section 315, as well as by the Executive proclamation fixing its amount and directing its levy: to be levied for the sole purpose of equalizing production costs at home and abroad—a protective formula.

This latter, we say, cannot be constitutionally done, and ask this Court to pass upon this point, now for the first time raised by the form of this legislation,

and to that end to grant our petition for a writ of certiorari.

The designation of this tax as a regulation of commerce does not change its nature, nor screen and protect this plan, nor turn it from an illegal delegation into a valid enactment. That is a name bestowed on it as a mere subterfuge to cover an illegal delegation of the taxing power.

A tax regulating commerce is still a tax and subject to all the limitations governing taxation, including the prohibition against its delegation. It is still (unlike commerce rate regulation) the power to destroy. No court can declare it confiscatory.

Again, a "regulation of commerce" is a polite name to give a purely protective levy. If bad as the latter, such designation, even if true, will not save it. Otherwise, for every tax affecting commerce and so named, the limitations preventing delegation and preventing a levy for private purposes, are completely destroyed—*reductio ad absurdum.*

In further support of the granting of a writ of certiorari, we refer to and rely upon the careful statement of what this flexible tariff really is, and the complete, convincing, and conclusive argument against its constitutionality, contained in the dissenting opinion of Judge George Stewart Brown of the trial court (R., 44 to 74). (G. A. 9116—T. D. 41478, 49 Treas. Dec. 595.)

All of which is respectfully submitted.

WALTER EVANS HAMPTON,
Counsel for J. W. Hampton, Jr., & Co.

NEW YORK, N. Y., *May* 6, 1927.

APPENDIX.

A.

Thomas Walker Page, sometimes Chairman of the Tariff Commission, and later Chairman of the Council, Institute of Commerce, Carnegie Corporation of New York, in his book entitled "Making the Tariff in the United States" (Chapter IV, pp. 83-99), says:

> "*The application of the difference between costs as a measure of duties is usually impossible owing to the difficulty of finding what the difference amounts to.* There is much misunderstanding as to what cost accounting can really show. It is true that no manager of any considerable and well-conducted business today fails to record the costs of the business and to make some analysis of them. He finds it desirable to do so in order to stop leaks, to promote efficiency, to exhibit the net profits of the enterprise, and for other purposes. There is a popular assumption that the records thus kept will accurately disclose the cost per unit of the products turned out. In fact, however, this is seldom the case.
>
> "A multitude of questions arise in regard to the items which should be allowed as component elements of cost, and to these the answers are different in different plants and also for different purposes. Shall the owner's salary, for instance, be considered a part of the cost of production; and if so shall he be allowed a salary at an arbitrary rate or shall the particular amount be allowed which he sees fit to claim? Shall the materials used be valued at their market price,

or at what it actually cost to procure them? Shall interest be allowed on the value of plant and equipment; and if so is it proper to take the value of the plant as a 'going concern,' or is it better to take as the value for estimating cost the outlay of the owners in acquiring and improving it? Such questions suggest that cost can be made to seem either high or low by the system of accounting which is followed. It might be possible in time to standardize the system and thus in a somewhat arbitrary way to reach a cost per unit of product in some industries that consist of simple and independent processes resulting in a single product. But such industries are relatively few. Modern industrial processes are commonly so organized and integrated that they contribute jointly to the completion of a number of different commodities. The accountant is usually faced, therefore, with the problem of joint costs, and the solutions accepted are *purely arbitrary* and differ widely from one plant to another.

"Even in a simple pastoral industry, such as sheep husbandry, this problem is encountered. It may be noted in passing that this industry also presents a number of other problems, which arise in determining what are to be accepted as elements of costs. Should rent on the land used and interest on the total investment be regarded as items of cost, and, if so, at what rate? On the other hand, should account be taken of certain indirect but valuable considerations, such as the destruction of weeds or the improvement of the soil; and if so, how can their value be appraised? But aside for any question as to how the total cost is constituted,

what is the *basis* on which it can be divided between the wool and the meat produced? The existing tariff law imposes duties at different rates on sheep, on mutton, on lamb, and on several varieties of wool. If these duties are to be measured by the difference between domestic and foreign costs, the total costs of sheep husbandry must in some way be distributed amongst the different products on which the duties are levied.

"The basis of distribution adopted by the Tariff Commission is doubtless as good as any. Thus the Commission reported that in Montana during 1919 the expenses for 82,122 sheep were $9.93 a head. This was made up of labor, interest at 6 per cent on investment, feed, fees and rentals, shearing, depreciation and miscellaneous. It is clear that no important item except shearing was incurred exclusively for a single product. Expenditures for labor, feed, and the rest were made for producing both meat and wool. The Commission divided the joint costs between these two products in proportion to the sheep owners' receipts from each of them. In that year it happened that 61 per cent of the total receipts in Montana came from wool and 39 per cent from mutton and lambs. As the average amount of wool sheared was slightly over eight pounds per head, this method of division showed the cost of wool in Montana to be more than 76 cents a pound. In the other range states it varied that year between 32 cents in Texas and about 49 cents in Idaho.

"The fallacy of the method is obvious, since it makes it appear that the smaller the receipts from either product the lower will its cost be.

This is clearly contrary to fact. Thus a hard winter, with feed scarce and dear, followed by bad weather during the lambing season, compels the flock owner to make unusual outlays to save any lambs at all. In spite of his efforts the lamb crop is apt to be poor and the lambs stunted and unable to make satisfactory development, so that his receipts from them are small. Under such circumstances the commission's system of accounting would show that the cost of the lambs was exceptionally low and that of wool proportionately high; and by a pernicious paradox if the lamb crop were a total failure, the lambs would have cost nothing at all! Conversely, conditions favorable to a good lamb crop would appear to raise the cost of lambs and thereby lower the cost of wool. It should be noted, however, that receipts vary not only with conditions of production but also with changes in the market, and the price received for lambs is determined by causes quite remote from those that determine the price of wool. Thus a rise for any reason in the price of wool would appear, regardless of the actual outlays incurred, to lower the cost of growing lambs.

"And yet, defective as the Tariff Commission's method of allocating costs may be, there is none that is better. *The truth is that there is no separate cost of producing wool.* There is a cost of growing sheep and for a defined locality year by year it may be found and recorded, but any distribution of the cost among the products of the business is altogether arbitrary. To the sheep owner this is a matter of little moment. He is not much concerned with

how much of the cost is to be allocated to wool and how much to lambs. *But to the tariff maker it is a matter of vital importance* if he is to put one duty on sheep and other duties on wool, mutton, and lamb, and if he must measure the duties by the difference between the domestic and foreign cost of producing these several things.

"The difficulty found in trying to establish the cost of producing wool is much greater when it comes to finding the cost of commodities, such as cattle hides, which are the by-product rather than the joint product of an industry. Agriculture presents many similar instances. *How can the cost of raising cotton seed,* for example, on which there is a duty of one-third of a cent a pound, *be segregated from the cost of raising cotton,* on which there is no duty at all? Flaxseed in some countries is a by-product of growing flax; in other countries flax is cultivated for the seed alone. *How is a comparison of costs to be made in such a case?* Straw is a relatively unimportant by-product of wheat, oats, barley, or rye. *On what theory can an independent cost be assigned to it?* Some varieties of hay are grown chiefly as a cover crop, others for their effect on the soil, and there is *no reasonable hypothesis* on which a *specific cost of production can be imputed to them.* Yet all these things are now dutiable.

"In many branches of manufacturing the problem of joint costs is even more confusing than in agriculture. In its study of the dye industry in 1919 the Tariff Commission found that different producers used five separate

bases for distributing expenses, namely, the amount of labor directly used on a given product, the cost of the raw material going into it, the amount of superintendence chargeable to it, the sales value of the product, and the capital investment imputed to it. Naturally the costs showed great diversity, and the commission on presenting its report found it necessary to 'strongly emphasize the uncertainty of conclusions drawn from the cost figures in this report, and the possibility of error in administrative action based upon such data. * * * The figures are, however, the most trustworthy and the most significant that can be immediately procured under present conditions in the industry, and in any discussion of the cost of production the tables must be accepted as the nearest approach to accuracy now possible.' It is true that the dye industry furnishes an extreme illustration of the difficulties involved in cost finding. But after all it is only a question of degree, and *the Tariff Commission's frank statement might well be extended to every industry resulting in a variety of products. 'The nearest approach to accuracy possible' must always leave room for 'uncertainty of conclusions drawn from the cost figures and the possibility of error in administrative action based on such data.'* Obviously, the uncertainty of cost data severely contracts the field in which the difference between foreign and domestic costs can be used to measure duties.

"Even if cost data were reliable the fact would remain that there is in every country more than one cost at which any commodity is produced in commercial quantities. From this

it follows that there is no such thing as a single domestic cost or a single foreign cost of production for any commodity. A report of the Federal Trade Commission in 1920 showed that in Oklahoma and Texas the cost of preparing a three-year-old steer for market varied on different ranches between $68.20 and $101.67. Even before the war the cost of making beet sugar in the United States differed at the factories all the way from $66.40 to $139.80 a ton. The cost per pound of growing wool (including interest on the investment) as estimated by the Tariff Commission for the range states in 1919 was 32 cents in Texas, 41 in California, 43 in Colorado, 49 in Idaho, 76 in Montana, 36 in Utah, 35 in Washington, and 48 in Wyoming.

"The process of manufacturing the pigment known as lithophone is comparatively simple. In 1919 it was carried on in the United States by eleven companies, who, taken together, produced 145,000,000 pounds. Their methods of accounting were detailed and fairly comparable though there was lack of uniformity in treating individual items, and the Tariff Commission found little difficulty in ascertaining costs for each company in the industry. One company was producing lithophone at 5.29 cents a pound. From this figure the cost rose quite gradually for other companies to a high point of 7.51 cents a pound. A subsequent investigation two years later showed costs ranging between 5.58 and 7.73 cents a pound, a variation equal to 38 per cent of the low cost. In more complicated and widely distributed industries costs when found usually show a far greater variation.

"Causes for this variation are numerous. It often happens that the same product is obtained from materials so widely different that the processes of manipulating them are utterly unlike. Thus potash in 1919 was obtained in the United States from natural brines, molasses, silicate rocks, kelp, wood ashes, the dust of cement mills, and other sources. Sometimes different methods are applied to the same materials. Ferromanganese, for example, made in blast furnaces in the United States was estimated to have an average cost of $159.67 a ton in 1919. It was being made at the same time in electric furnaces at an estimated average cost of $218.94 a ton. Similar differences were observed in the case of other ferro alloys.

"Very often costs vary because of unequal climatic conditions, qualities of soil, advantages of location, or availability of fuel or water power. Quite obviously they are strongly affected by the efficiency of management, which differs widely from plant to plant. Sometimes also the variation is caused by what appears to be a mere element of chance. Two cloth manufacturers, for example, may be equally well situated and equally efficient, using the same materials and practically the same processes so that their products show no appreciable difference in texture or quality. Yet the fabrics turned out by one of them happen to please the public fancy by reason of some peculiarity of color or design, and the mill producing them runs throughout the season at full capacity. The fabrics of the other fail to meet the whim of prevailing fashion; orders for them are small and the mill's output is correspondingly

reduced. At the end of the season the costs per mill might approach equality, but the cost per yard of these similar fabrics would show a wide divergence. In 1918 the western half of the cotton belt was visited by a severe drought which so damaged the crop that on many plantations the actual cost of the cotton picked was more than $1.00 a pound. In the Eastern States, on the contrary, the season was favorable, and the cost of much of the cotton picked was less than 20 cents a pound. *These illustrations suffice to show that variation in costs of production is general, that it can not be compensated by any method of bookkeeping, and that it can not be prevented by any device of human ingenuity.*

"*There is, in fact, no such thing as a single 'domestic cost of production' for any commodity.* There are almost as many different costs as there are producers; and the question arises: which should be taken for comparison with a foreign cost to find a standard for measuring duties? It is obvious that the higher the figure taken the greater will be the proportion of the industry protected. But no one would advocate duties high enough to protect producers whose high costs are due to unwise location, inadequate equipment, extravagant methods, or poor management. On the other hand, if the lowest cost be taken it might well result in no duty at all, for the lowest domestic costs are sometimes less than are the lowest costs abroad.

"Perhaps the advocates of this method of tariff making most commonly have in mind a comparison of the *average* domestic cost with the *average* foreign cost. Now the average

might mean either the average cost per unit of the commodity under consideration, or the average cost in the different plants producing it, or the cost that is just midway between the highest and the lowest in the industry. *These three figures would never coincide except by accident, and none of them would precisely meet the purpose in mind.* Consider by way of illustration the operation of averages in the industries already mentioned: The Tariff Commission estimated the average cost per pound of producing raw wool in the range states in 1919 to be 45 cents. A representative of the commission who visited Argentina estimated the average cost in that country at the same time to be 27⅓ cents. The difference then was 17⅔ cents. But a duty at this rate on unscoured wool would be 12 cents a pound higher than was shown to be needed in Texas, and higher than was necessary in five other range states, while it would fall short by 50 cents a pound of protecting sheep raisers in Montana and by less amounts in Arizona, Idaho, and Wyoming.

"For lithophone the Tariff Commission gave the average cost not by pounds produced but by companies producing it. This average during the first six months of 1921 was 6¼ cents. For half the number of producers the cost was less than this and for half it was more. There is nothing to show what part of the total output was produced above or below the average cost of the different companies. But whatever the average cost per pound may have been, it is clear that a duty based on the average cost of the separate producers would have given unnecessary protection to some of them and would

have left others unequally exposed to foreign competition.

"Again, the domestic beet-sugar factories of the United States in 1918 showed an average cost of $130.61 per ton. But the factories producing at a lower cost than this had a greater output than those where the cost was higher, so that the average cost of the beet sugar they all produced was only $109.96 a ton. In that year the average cost by tonnage in Cuba was $78.72. A duty then of $31.24 a ton—or say, roughly, $1.57 cents a pound—would have equalized the difference in costs for half the beet sugar produced in the United States, but for substantially less than half the producers. Now it happens that the highest costs are found in the eastern region of production, that is, Michigan, Ohio, Wisconsin, Indiana, Illinois, Minnesota, and Iowa. A duty, therefore, high enough to protect only the average would have sufficed for the mountain states, would have more than sufficed for the Pacific Coast, but would probably have put out of business most of the eastern beet-sugar factories as well as the cane growers of Louisiana.

"It is hardly to be expected then that a committee of Congress framing a protective tariff will accept as 'the difference between foreign and domestic costs' a mere difference of averages and base upon it duties that it believes would fail to protect wool growers in such important centers of the industry as Montana and Wyoming or beet-sugar producers in a region of such great political power as Michigan, Ohio, and the adjoining states.

"It is well to remember, furthermore, that in most industries costs vary from time to time as widely as they vary from plant to plant. Wool, for example, which was estimated to cost 76 cents a pound to produce in Montana in 1919 had been produced for less than 44 cents in that state the year before. *To establish a reasonable average cost, therefore, would require an investigation of protected industries, not for one year only but for a number of years. This would render the proposed method of tariff making impossible until after the lapse of at least half a decade and the expenditure of many millions of dollars.*

"*The difficulties of obtaining and verifying costs of production are infinitely greater in foreign countries than they are in the United States.* Any investigation of foreign costs would not only encounter in exaggerated form the difficulties found in the study of domestic costs, but would also meet others that are even more serious. *With rare exceptions the ascertainment of such costs with any degree of accuracy is wholly impossible by an agency of the American government.*

"In its inquiries at home the Tariff Commission is empowered by law to compel any person, firm, or corporation to produce its books or papers and to give all pertinent information under oath in regard to the subject under investigation. The commission has no such power abroad. It must depend upon published materials, the general observations of its agents, and such information as foreign producers may be willing to give. But it is quite inconceivable that the manufacturers of any country would

tolerate a detailed investigation of their business by the agents of a foreign government which proposes to use the results as a ground for strengthening the position of its own citizens. Trade secrets, as a rule, are more jealously guarded abroad than in the United States. Foreign manufacturers are more dependent than Americans have been on export markets, and fierce competition in international trade has made them secretive in regard to processes, costs, prices, and business connections. They would raise every possible obstacle to the disclosure of the intimate details of their business to men who, though they might be under pledge as government agents at the time, yet may become the employees of their overseas competitors in the near future.

"The difficulty of foreign investigation is indicated by the following question put to Professor Jastrow to agents of the Tariff Commission at a meeting arranged for them with German manufacturers in 1921.

" 'It is suggested that German production costs should be ascertained in order to base American tariff rates thereon. I have followed during the last twenty or thirty years the efforts of the German manufacturer to determine accurately the cost of production of the articles he manufactures, and I have failed to find that any one of them has as yet discovered a method by which he could exactly establish his production costs. *As we in Germany do not know our costs of production what reason has the United States for hoping to determine our cost of production which we do not know ourselves?* I

should like to know something about the methods which the United States may employ to be able to bring this about.'

"This is testimony on competent authority to the impossibility of finding out with accuracy even domestic costs. Of significance also were articles in the German press during this visit of the commission's agents commenting on the suspicion evident among German manufacturers that the information sought might be placed at the disposal of American manufacturers and that the activities of the agents were in the nature of commercial spying. The Secretary of the National Association of German Industries told the agents that the objection of German manufacturers to giving them information was due in large measure to the nature of the questions asked. They considered such matters as construction, speed, the nature and use of machinery, and the like to be trade secrets and felt that they were under no obligations to disclose them to foreigners. Several manufacturers did indeed furnish reports to the commission's agents, but no opportunity was granted to check them by an examination of books or personal inspection of plants. The reports threw considerable light on the state of German industry, but they were quite general in character, and as was to be expected they included in the main such facts only as would show that high American duties were not necessary.

"Indicative of the attitude of French manufacturers is a report of the American Consul at Marseilles under date of November 15, 1922.

"At a meeting held by French manufacturers on this subject at Paris on October 21, 1922, the

principal speaker took the attitude that production costs can not well be set forth by French manufacturers. He said:

" 'There can be no question of hunting out or revealing their costs of production. *The diversity of conditions within any industry is such that investigations of this kind could not give results of practical utility'* * * *

"The meeting * * * agreed with the foregoing attitude and decided to collect information showing merely the proportions in which production has become more expensive in France since before the war. Even these data, which can aid the Tariff Commission very little in seeking to render Section 315 operative, are to be revised and interpreted by the French Minister of Commerce before they are made available. * * * They have always resented investigations by American agents into their costs of production; and it is very doubtful whether such investigations, if made without their genuine co-operation, will yield results conforming to the necessities of the Tariff Commission under the rigid terms of the act. It is to be recognized that there is some reason in their argument that it is impossible to establish any staple average for production costs in many industries.

"A letter of December 4, 1922, to the Tariff Commission from its agent in France says:

"They are opposed to and will undoubtedly obstruct as much as possible any investigations which the commission may desire to make in France. They have informed me that the French government itself has never been able to pass even a census law which would go beyond verifying the number of establishments and

workers therein, and that even for fiscal purposes French officials had difficulties in getting at the books of manufacturers and merchants. That it would, therefore, establish a very dangerous precedent to grant the right to a foreign official to verify costs of production in France. * * * However, to facilitate the work of the Tariff Commission the Government and the National Association would endeavor to supply the commission with all information of a general character, so that it would be spared the trouble of making a research for statistics distributed throughout numerous publications."

B.

Thomas O. Marvin, present Chairman of the Tariff Commission, at page 26 of the Commission's Report on Wheat and Wheat Products, says, among other things:

> "* * * the experts of the commission were compelled to prepare an *estimated* or *theoretical cost* based upon a system of allocating a percentage of milling costs in the proportion which *receipts* for mill feed bore to *receipts* for flour."

C.

F. W. Taussig, of Harvard, another former Chairman of the Tariff Commission, in his address on December 9, 1925, before the American Economic Association, published in the Congressional Record of January 4, 1926, page 1051, says:

> "The point which is important for my present argument is that any decision which is finally reached—any figure which purports to state the differences in cost—necessarily involves the exercise of judgment. No exact and certain conclusion can be reached even by the most perfectly conducted investigation. There is always the possibility of choice between different results, according as you select one or another method of averaging, cover one or another period of time, put your marginal produce or your bulk line at a higher or lower point, consider this figure or that to be the representative one. Even the most competent and impartial tariff commissioner will often have to confess that there is no one figure which can be unqualifiedly said to be the accurate one."

D.

Philip G. Wright, in the *Review of Reviews* for November, 1922, page 502, says:

> "In many cases the collection of costs is impossible for the simple reason that they do not exist. What, for example, is the cost of producing wool as distinguished from mutton, of hides as distinguished from beef, of gasoline as distinguished from kerosene, lubricating oil, and a dozen other petroleum products? Where costs can be ascertained it is found that no two manufacturers manufacture at the same cost, and the problem of selection arises. Shall it be the highest or lowest, the average or marginal that is to be used for determining the duty? Wages and prices of materials are extremely uncertain guides. In the case of 29 sugar centrals in Cuba, all having the same opportunities for obtaining labor and materials, the highest unit cost was more than twice the lowest, with the costs for the other 27 ranging in gradation between."

E.

President Coolidge, when (after consulting other departments and after pointing out how conditions may change during the progress of an investigation) in making his "findings" declining to follow the Tariff Commission's recommendation upon Sugar, describes this process as one involving choice or discretion in the following words (Sugar Report, July 31, 1924, pp. 216, 217):

> "It is obvious from the reports that there is a wide variety of conclusions which can be obtained, peculiar in this industry, by alternative methods of interpretation of the same basic data. This appears to me to be fundamentally due to the wide fluctuations in the cost of production in different years and in different parts of the industry for which averages have been taken. These variations have been as much as 200 per cent, and in itself seems to indicate that a longer period of more stable conditions is desirable before conclusions. For instance, in arriving at a conclusion from the data in hand it is possible to base interpretations either upon the six-year period which embraces in its first four years a time of great distortion of costs due to inflation and deflation, or it is possible to base conclusions upon either two or three most recent years. It is also possible to arrive at different conclusions based on whether we compare costs of different regions during the time of production or during the time of marketing of the products. It is also possible to vary conclusions by the different methods of interpretation involved in advantages and disadvantages in competition. Furthermore, as the beet-sugar in-

dustry is the one for which we must have utmost solicitude, it is possible to vary conclusions by the adoption of that industry as the standard or by the inclusion of all other forms of domestic and insular production, and to still further vary them by adoption of the costs of the beet industry in particular States."

F.

The Honorable Chief Justice of this Court, when President of the United States, said:

> "The difficulty in fixing the proper tariff rates in accord with the principle stated in the Republican platform is in securing reliable evidence as to the difference between the cost of production at home and the cost of production abroad. The bias of the manufacturer seeking protection and of the importer opposing it weakens the weight of their testimony. Moreover, when we understand that the cost of production differs in one country abroad from that in another, and that it changes from year to year and from month to month, we must realize that the precise difference in cost of production sought for is not capable of definite ascertainment, and that all that even the most scientific person can do in his investigation is, after consideration of many facts which he learns, to exercise his best judgment in reaching a conclusion."
>
> (Copied from Journal of Commerce & Commercial Bulletin, August 20, 1910, and August 29, 1910; also from a public letter, dated Beverly, Mass., August 20, 1910, to Mr. McKinley, Chairman of the National Congressional Republican Committee.)

G.

United States Tariff Commission's Report on Wheat and Wheat Products, March 4, 1924 (p. 26); statement by Thomas O. Marvin:

> "In consequence, the experts of the commission were compelled to prepare an estimated or theoretical cost based upon a system of allocating a percentage of milling costs in the proportion which receipts for mill feed bore to receipts for flour. As the business is actually conducted, mills merely credit or deduct feed at the current price from their total costs; the higher the price of feed the lower can they quote for flour. According to the testimony of millers, $1 per ton upon mill feed amounts to about 3½ cents per barrel of flour."

II.

(P. 28:)

> "The applications of the data which, in our judgment, warrant and require the foregoing determinations will now be stated.
>
> "With respect to the data on wheat the following alternatives present themselves:
>
> "1. Shall the costs for the year 1923 be applied or shall the average of the costs for the years 1921-23 be applied?
>
> "2. Shall the difference between American and Canadian costs be measured between points representing a weighted average cost in the two countries respectively, or at a point representing a cost at or below which the bulk of the American product is produced?

"3. Shall account be taken of differences in costs of transportation from the points of production to some assumed common market in the United States?"

III.

"It seems clear to us (1) that 1923 costs should be applied; (2) that the difference should be measured at a point covering the bulk of American production; and (3) that transportation costs should not be taken into account."

(Pp. 31, 32:)

"No one statistical device can be accepted as controlling, the effect of which is to enable the domestic demand for the product to be supplied at a price level which would eliminate a large proportion of American producers.

"Any assumption that the weighted average cost is preferable because it would permit a determination of cost differences with greater mathematical precision is a mistaken assumption. The data collected in this investigation are not the costs of all the hard spring wheat producers in the United States and in Canada. They are the costs of a limited number of representative producers in certain representative areas. Any automatic weighted average of the entire hard wheat production in each country is therefore out of the question. In any event, the conclusion rests upon premises arrived at as a result of a process of representation. Nor is this all. The very object of this investigation is the ascertainment of representative costs. No cost can be representative which does not reflect cost of the bulk of production.

If any statistical method or process is not fitted for the ascertainment of a unit cost of the bulk of the domestic product, it is to that extent defective and inapplicable. To adhere to it upon the assumption that it has greater mathematical precision involves an implication of certitude which is delusive."

(P. 38:)

"But not only would an investigation confined to the costs of the 1923 crop (assuming that it could be completed by March, 1924), prove futile for the present emergency; it would be equally useless for determining what, if any, duty is normally required to equalize the differences between foreign and domestic costs. For that purpose, the investigation, as in other cases, must cover a period sufficient to indicate the *advantages and disadvantages* in competition which the duty is assumed to measure and equalize. Thus a hurried investigation would be neither an immediate remedy for the present crisis nor an effective application of the statute in general."

(P. 40:)

"The chief witness who testified in the commission's public hearings with reference to the application of the bulk line was Prof. R. E. Willard, a farm economist of the North Dakota Agricultural College, who appeared in behalf of a committee of farmers, bankers, and business men of North Dakota. Professor Willard said in part (stenographers' minutes, United States Tariff Commission, February 18, 1924, pp. 332-335):

'The question of the bulk line is a rather theoretical and sometimes vague proposition. Bulk line is usually determined in the range of costs at a point where it is supposed that if the price were placed at that point, it will maintain a certain standard or a certain quantity of production. In other words, in all lines of production there are those who are on the upper extreme in costs and those who are on the lower extreme. The bulk of the commodity that is required for consumption is the object sought for, and if there is too much production the bulk-line point may be lowered in order that the greater number may be in the high-cost class, while if there is too little, the price may be established at a point to increase production, and therefore the point would be raised in the scale of costs, and there would therefore be a less number producing at a loss than in the other case. Whether the same bulk-line point should be established in Canada as in the United States, if we were to consider the two propositions, is a matter, it seems to me, that the commission would have to determine, based upon the desired result. If it is desired to increase production in the United States, the bulk line would be placed low in the scale. * * * It is just the reverse. It would be placed in the scale so that there would be a less number producing at a loss. * * *'''

INDEX.

	Page
Supplemental brief for petitioner	1

TABLE OF CASES CITED.

Cramer v. Arthur, 102 U. S., 615	5
Downes v. United States, 187 U. S., 496	5
Field v. Clark, 143 U. S., 649	2, 3, 6
Nicholas v. United States, 249 U. S., 34	5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1115

J. W. HAMPTON, JR., & CO., PETITIONER,

vs.

THE UNITED STATES.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

As stated in the original petition (p. 2), the Department of Justice filed a certificate with the United States Court of Customs Appeals (R., 76), in which the Attorney General certified that, in his opinion, the case is of such importance as to render expedient its review by this Court.

Under the express terms of Section 195 of the Judicial Code, certiorari may be granted when a constitutional question is in issue in a customs case *without certificate of importance being filed.*

Being advised and surprised that there is a probability of the Department of Justice opposing the petition, notwithstanding it agreed to, and did file the certificate, it is deemed necessary to refer to Field *vs.* Clark, 143 U. S., 649 (R., 83), and other cases cited in the opinion below.

In the petition and brief we treated the subject in a condensed and general manner. We mentioned principles only. As there may not be sufficient time to reply, it is thought necessary to anticipate.

At page 10 of the petition ("H") we condensed (1) the merits; (2) the reasons of and for the decisions cited by the court below. The Field case, whilst a tax case, principally involved and was based on the question of *reciprocity*, necessarily comprehended compensatory-retaliatory acts. Reciprocity and retaliation is speaking for each other.

The Field case is the only tax case cited in the opinion below in which the question here at issue, *i. e.*, the legality of the delegation of the power to tax, was raised in brief or argument, or discussed in the opinions of this Court.

In the Field case four tax rates were named in the act itself. The President did not calculate, estimate, speculate or guess at their amount, or use an indefinite formula, as he does here, such as "*any other advantages or disadvantages in competition.*"

In the Field case the President was given power to put the statutory rate into effect against such countries as to which he found (as a fact) discriminated against our export trade by their laws. That was a

very simple finding, based upon a certainly ascertainable fact, concerning which no two intelligent minds could possibly differ. This, the majority of the Supreme Court held, involved no discretion to make the law on the President's part.

The plain inference from Mr. Justice Harlan's opinion is that, had he found (as the dissenting justices claimed) that the reciprocity provision involved executive discretion and judgment, choice between different results (as does the flexible tariff), h vould have held the act unconstitutional.

No one can reasonably contend that using "any other advantages or disadvantages in competition," in order to evolve a tariff rate, is merely finding a "fact" on which a statute can be made to take effect or depend. Nothing indefinite like that was in the reciprocity law sustained in Field *vs.* Clark.

Difference in cost of production is no standard, because it involves choices between different results at every stage, but "any other advantages or disadvantages in competition" is no standard on its face. There is nothing definite or certain about the expression. Yet it is there in the act, and it cannot be ignored. Its presence makes Section 315 unconstitutional, irrespective of the unconstitutionality of the "difference in cost of production" formula.

Under the flexible tariff the President fixes the rate of a future tax, as a result of estimating costs in individual factories or farms, first chosen as representative, and after arbitrarily (there is no other way) separating costs of joint or by-products; then, after choosing between a weighted average cost, or a bulk-line

cost or some other method, and then applying the chosen method of averaging at the desired point, and then averaging the cost of transportation to a common market; and, after having chosen whether the investigation shall cover one year or five years, with changing conditions, then comparing these with foreign costs arrived at in the same uncertain and indefinite way; on top of all this, using "any other advantages or disadvantages in competition" as a mysterious further method of finding differences in cost of production.

Discretion, choice between different results, decision and judgment, is experienced at every stage of this process.

To compare such an elaborate exercise of the mind with the simple process of looking into a book (see Solicitor General's statement in note below), as in the Field case, in order to detect foreign discrimination against our export trade is impossible. The two processes are intrinsically and fundamentally different. There is no comparison. To make such a comparison is as legally absurd as to liken the flexible tariff to the *ad valorem* appraisement of merchandise.

The latter claimed analogy is tantamount to saying that there is no difference between fixing the rate of a future tax for all importations and applying an existing rate to a particular shipment on a day certain from a particular foreign factory. Or that an act of new legislation is the same thing as a legal contest over the application of an existing law to a particular importation.

There is no substantial dispute in this case that the action of fixing a tariff rate under Section 315 is legis-

lation. The comparison is between the action of the President in merely finding a simple fact of discrimination against our export trade, upon which the rate already named takes effect, as in Field *vs.* Clark, or conjecturing differences in cost of production while considering *"any other advantages or disadvantages in competition,"* from which complicated action (above described) a new rate of taxation emerges.

The former this Court held in the Field case could be legally done. For the latter (Section 315) there is no legal precedent or authority. No case has sustained any tax statute remotely resembling it.

It is this new adventure in law making, this new experiment in the delegation of the taxing power to the Executive, which we ask this Court to review by certiorari, for this in effect, is the result of the decision below.

The countervailing duty cases, Downes *vs.* U. S., 187 U. S., 496, and Nicholas *vs.* U. S., 249 U. S., 34, and the currency cases, such as Cramer *vs.* Arthur, 102 U. S., 615, are not in point, because in them no question was raised of delegating legislative power or taxing power; and of course no such question was discussed by this Court in the opinions.

The Court of Customs Appeals' opinion deals with unrelated matter, standing on a different footing, principally justiciable controversies over carrier rate making or regulation and similar justiciable questions. This case involves the delegation of the power to fix the future tax rate.

The tax levying power stands in a class by itself, because, being the exercise of the power to destroy, the

Executive action under the flexible tariff is not subject to judicial review for confiscatory or arbitrary action or unreasonableness, or to review the discretion imposed in fixing a new tax rate within the limits prescribed by the section.

(NOTE.)—The Solicitor General (now Mr. Chief Justice Taft) said in the Field case, 143 U. S., 649, No. 1052, October Term, 1891, in brief for the United States, page 87:

> "If the tariffs of the foreign countries are reciprocally reasonable and equal toward the productions of the United States or are made so, then their sugar, hides, coffee, and tea are to come in free; if the foreign tariffs are not so reciprocally equal and reasonable, then certain duties are to be imposed on the four articles from those countries. The President is required to determine whether the foreign tariffs are reciprocally equal and reasonable to merchandise of the United States or not, and when he determines that they are not, he must proclaim the fact, and the free list is suspended and duties are imposed."

Compare this with (Section 315) changing the whole dutiable schedule within a range of 100 per cent, from the highest changed rate to the lowest changed rate, and even more if American selling price is used.

All of which is respectfully submitted.

WALTER EVANS HAMPTON,
Counsel for J. W. Hampton, Jr., & Company.

NEW YORK, N. Y., *May* 26, 1927.

Office Supreme Court, U.S.
FILED
SEP 17 1927
CHARLES ELMORE CROPLEY
CLERK

No. 243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

J. W. HAMPTON, JR., & CO., PETITIONER,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

MOTION TO ADVANCE.

PRESS OF VREDENBURGH PAYNE, NEW YORK CITY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 242.

J. W. HAMPTON, JR., & CO., PETITIONER,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

Motion to Advance.

Comes the above named petitioner and moves to advance this case for early argument on a date convenient to the court, and for cause says:

The question presented here is whether Section 315, of the Tariff Act of 1922 (42 Stat., 358, 941), is constitutional. This is the so-called Flexible Tariff Provision.

It involves an important constitutional question, affecting in its ultimate results, not only the entire business of manufacturing and importing merchandise, but the future policy and legal practice of the Federal Government in the levy of every kind of Federal taxation; thus affecting, as well, the whole people of the United States.

At no time since the creation of our Federal Government has such a novel innovation in taxation been advanced. This is a case of first impression, involving a totally new question, which, it is respectfully submitted, should be speedily decided.

As in duty, etc.,

WALTER EVANS HAMPTON,
Counsel for Petitioner.

New York, N. Y.
September 14, 1927.

FILED
JAN 28 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 242.

J. W. HAMPTON, JR., & CO., PETITIONER,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

WALTER EVANS HAMPTON,
Counsel for Petitioner,
17 Battery Place,
New York, N. Y.

PRESS OF FREMONT PAYNE, NEW YORK CITY

INDEX

	PAGE
Jurisdiction of the Court	1
Statement of the Case	1
Summary	2
Questions Involved	3
Statutes Involved	5
Broad Scope of the Executive Power to be Granted	9
Preliminary Argument	13
Illustration of the Radical Innovation in Tax Legislation	18
General Argument	19
Point I	30
Point II	36
Point III	42
Point IV	44
Point V	47
Point VI	53
Point VII	56
Point VIII	60
Point IX	64
Point X	65
Alternative Point	67
Conclusion	76
Appendix A	78
Appendix B	91
Appendix C	92
Appendix D	93
Appendix E	94

PAGE

Appendix F 94
Appendix G 95
Appendix H 98
Appendix I 102
Appendix J 106
Appendix K 127
Appendix L 143
Appendix M 146
Appendix N 150
Appendix O 151
Appendix P 155

Cases Cited.

Arthur v. Richards, 90 U. S., 259 .....28, 64
Auffmordt v. Hedden, 137 U. S., 310 56

Bailey v. Drexel Furniture Co., 259 U. S., 20 71
Boyd v. United States (116 U. S., 616, p. 635) 17
Buttfield v. Stranahan, 192 U. S., 470 45

Child Labor Tax Case, 259 U. S., 20 69
Cramer v. Arthur, 102 U. S., 612 .....28, 64

Downs v. U. S., 187 U. S., 496 .....28, 53, 55

Evans v. Gore (253 U. S., 245; 40 Sup. Ct. Rep., 550). 15

Fairbank v. U. S., 181 U. S., 283 74
Field v. Clark, 143 U. S., 649 .....15, 25, 29, 46

Hadden v. Merritt, 115 U. S., 25 .....28, 64
Hannibal Bridge Co. v. U. S., 221 U. S., 194..... 45
Hill v. Wallace, 259 U. S., 44 ..... 69, 71

In Re Brig Aurora, 7 Cranch. (11 U. S.), 382..... 46
Interstate Commerce Commission v. Brimson, 154 U. S., 447-449 76

PAGE

Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S., page 92 64

Kendall v. United States, 12 Peters, 524, 610 15

Loan Association v. Topeka, 20 Wallace, 655.....69, 71

Market Co. v. Hoffman, 101 U. S., 112, 115 51
Monongahela Bridge Co. v. U. S., 216 U. S., 177 45
Monongahela Navigation Co. v. U. S., 148 U. S., 312-336 75
Moore v. United States, 249 U. S., 487, 489 51
Muser v. Magone, 155 U. S., 240 57
Myers v. United States (272 U. S., 1) 15

Nicholas v. U. S., 249 U. S., 34 ..... 28, 53

Passavant v. U. S., 148 U. S., 214 56
Passavant v. U. S., 169 U. S., 16 56
Porto Rico Ry. Co. v. Mor, 253 U. S., 345, 348 and cases cited 50

Railway Commission v. C. B. & Q. R. Co., 257 U. S., 563, 589 51
Reading R. R. Co. v. Pa., 15 Wallace, 232, 278 64

South Carolina v. United States, 199 U. S., 437 68
Stairs v. Peaslee, 59 U. S., 521 (18 Howard).....56, 57

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S., 426 63
Trusler v. Crooks, decided by the Supreme Court, Jan. 11, 1926 69
Truax v. Corrigan (257 U. S., p. 312; 42 Sup. Ct. Rep., 124, at p. 131) 17

Union Bridge Co. v. U. S., 204 U. S., 364 45
United States v. Boyer, 85 Fed., 425, 432 68
U. S. v. Chemical Foundation, 272 U. S., 1.....46, 65
U. S. v. Grimaud, 220 U. S., 506..... 45

PAGE

U. S. v. Klingenberg, 153 U. S., 93 ..... 28, 64
United States v. Lexington Mills, etc., Co., 232 U. S., 399, 410 51
United States v. L. Cohen Grocery Co. (255 U. S., 81; 41 Sup. Ct. Rep., 298, at 300, 1st col.) 14
United States v. Ninety-Nine Diamonds, 139 F., 961, 963 51
United States ex rel. Norwegian Nitrogen Products Co., Inc. v. Tariff Commission (274 U. S., 106; advance sheets) 18, 58
United States v. Standard Brewery Co., 251 U. S., 210, 217 51
U. S. v. Joint Traffic Association, 171 U. S., 505, 271 76
Waite v. Macy, 246 U. S., 606, T. D., 37647 45

AUTHORITIES CITED.

Extract from Dr. Thomas Walker Pages' book (Chapter IV, pp. 85-87) 38
Congressional Record, August 11, 1922, Vol. 62, Part II, 67th Congress, 2nd Sess., page 11226, etc. ... 48
Willoughby on the Constitution, Vol. 2, p. 1319 52
4 Treas. Decisions, pt. 406 55
Virginia Ratification Convention, 2 Elliott's Debate, 244, 245 69
Paul Leicester Ford's "Jefferson", Vol. Eleven, p. 489 69
The 41st number of the Federalist by James Madison 69
Speech of Henry St. George Tucker in the House of Representatives, March 3, 1926 69

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 242.

J. W. HAMPTON, JR., & CO., PETITIONER,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

The opinions below are reported as follows:

United States Court of Customs Appeals, 14 Ct. Cust. Appls., 350; United States Customs Court, 49 Treas. Dec., 593, T. D. 41478 (R., 11; Dissent, R., 42).

For jurisdiction, petitioner relies on:

Writ of Certiorari, granted June 6, 1927 (R., 106); Sec. 195 (36 Stat., 1145), of the Judicial Code, as amended August 22, 1914, C. 267 (38 Stat., 703), as amended September 6, 1916, Sec. 6 (39 Stat., 726, 727).

Judgment to be reviewed is dated February 24, 1927 (R., 105); Mandate March 26, 1927 (R., 105).

Statement.

This case raises the question of the constitutionality of the so-called flexible tariff provision (Section 315, Tariff Act of 1922 (42 Stat., 358, 941). There is a monetary in-

terest involved to recover duty paid to the collector of customs, New York, who assessed, by virtue of a proclamation of the President (R., 14), 45 Treas. Dec., 669. T. D. 40216, Barium Dioxide, at 6 cents per pound; instead of the statutory rate of 4 cents per pound, paragraph 12, 42 Stat., 860.

Protests and appeal were made (R., 7, 8), as provided by section 514, part III, Title IV, 42 Stat., 969, and the case came on for trial before the Board of United States General Appraisers—since denominated the United States Customs Court (44 Stat., 669, C. 411, sections 1, 2,—Part I; 49 Treas. Dec., 943, T. D. 41616). The United States Customs Court was divided (majority op's r. 11; dissent r. 42). Thereafter, on appeal to the United States Court of Customs Appeals, the lower court was affirmed (R., 105).

Summary.

The question is one of law. The protest lodged with the Collector of Customs at New York (R., 7, 8) is as follows:

> "We hereby protest against your decision assessing duty at the rate of six (6) cents per pound, or other rate or rates, on certain merchandise known and assessed as Barium Dioxide, or Barium Peroxide, and or other merchandise, covered by entries below mentioned.
>
> We claim that the merchandise is properly dutiable at four (4) cents per pound, under paragraph 12, of the Tariff Act of September 21, 1922.
>
> We further claim that if the assessment and liquidation of duty is purposed to be made by authority of the President under section 315, etc., Title III, of said act, it is unconstitutional and void; that the President's proclamation dated May 19, 1924, T. D. 40216, is unconstitutional and void:

(1) Because it is done under and by virtue of an illegal delegation to the Executive Department of the power to legislate, which power, by the Federal Constitution, is solely committed to Congress.

ARTICLE I.

'SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.'

(2) Because it is done under an illegal delegation to the Executive Department of the power to tax, which power is alone lodged in the Congress of the United States by 'Section 8'. 'The Congress shall have power to lay and collect taxes, duties, imposts and excises, * * *."

(3) Even if in form it has been done by constitutional delegation of legislative power and of the taxing power it purports on its face to make a levy, not for raising public revenue, but under a declared policy for protection to American industries, based upon difference of cost of production at home and abroad, which is not a tax or duty within the meaning of the Federal Constitution.

We further claim that your action and decision, the acts of the Tariff Commission, and the act of the President of the United States, are singly, and collectively, null and void, being unconstitutional; that is to say, being contrary to the express provisions of the Federal Constitution and the specific grants of power bestowed only and contained in said Constitution."

The case raises the following questions:

A. The constitutionality of an act of Congress.
B. It challenges the legality of delegation of the power to tax, which is the power to destroy.

C. That never before in our history has the power been given to a delegee, to fix, change, and amend a rate of duty, much less the entire dutiable schedule of a tariff act. This is a power, not only to change the rate, but the classification. Such is purely legislative.

D. (1) That the difference in cost of production at home and abroad cannot be accurately found; (2) That the section bestows upon the President the power to use discretion, opinion, estimation, guess, and judgment; (3) That under the section he cannot find the fact, without using legislative discretion.

E. That this scheme of tariff taxation is revolutionary; destroys the primary constitutional safeguard to liberty and property, which limits to Congress alone the power to fix the amount of a future tax.

F. It provides for a levy, which appears on the face of the statute, for trade advantage to particular citizens and cannot be called a tax laid for the "common defense and general welfare", because it is not for the support of the general Government.

G. It is not subject to judicial review because it is the purely political act of fixing the amount of a future tax.

H. The opinion of the Court of Customs Appeals fails to distinguish the cases cited by it which dealt with interstate commerce, navigation, bankruptcy, health, pure food, immigration, morals, war, and countervailing or compensatory—retaliatory duty—reciprocity; the delegations being based on, and being accounted for, by the reason that it was *impracticable to handle the thing in any other way.* Congress has been passing tariff acts since the beginning of our Federal Government.

I. Because the section consolidates the legislative and executive.

J. Because the Court of Customs Appeals holds in effect, that fixing the future tax rate is the same as appraisement of a parcel of merchandise from one factory exported on a day certain.

K. The power delegated is not fundamentally, substantially, or actually the same as other powers sometimes delegated.

The Statutes involved are:

Tariff Act of September, 1922, Title I, Par. 12 (42 Stat., 860):

"* * *: Barium dioxide, 4 cents per pound."

Title III, Section 315 (42 Stat., 358, 941):

"Sec. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased

duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the said differences in costs of production in the United States and the principal competing country cannot be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation of the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under such subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraphs (1), (2) and (3) of subdivision (a) of section 402 of this Act.

(c) That in ascertaining the differences in costs of production under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which lead to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(d) For the purposes of this section any coal-tar product provided for in paragraphs 27 or 28 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results substantially equal to those accomplished by the domestic product when used in substantially the same manner.

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

(f) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported articles of the class or kind of articles upon which the President has made a proclamation under the provisions of subdivision (b) of this section and for the form of invoice required at time of entry.

The broad scope of the Executive power attempted to be granted here.

1: The President can generally raise or lower the rates, and thus re-write the whole dutiable schedule.

2: He may change the statutory specific rate upward or downward, 50 per cent.

3: He may go further with ad valorem rates. If he be of opinion, based on his judgment, that 50 per cent. change in *ad valorem rates* will not meet the supposed differences between foreign and domestic costs, he must change the method of valuation on the foreign market value, and substitute the American value, which is the price of an American competitive article. This will not expand the limit of "decreases", but it does extend the limit for "increases", perhaps to many hundred per cent. So, as to "increases" in ad valorem rates, the supposed limit of 50 per centum is more apparent than real. The 50 per cent. limitation is not, in all cases a limitation at all; it is a subterfuge; a blind. The change to the American valuation demonstrates this, as well as the power to change the classification. Furthermore, the President has power to fix the rate he desires anywhere between 1 and 50 per centum, upward or downward.

4: He, decreeing the American valuation basis (Subsec. b) may lower the statutory rate to meet the supposed cost differences, but only to the extent

of 50 per centum; which may not be enough. The resultant duty will therefore be more than the supposed foreign and domestic cost differences; an irregularity which boldly departs from the difference in cost formula. And he is specifically empowered to depart from this formula by taking into consideration "prices", and "any other advantages or disadvantages in competition." All this expands and makes more indefinite and more uncertain the supposed "difference in cost-formula" itself; expands it away beyond any ordinary conception of cost-differences. It involves the whole section. The scheme requires the President to equalize cost differences. In changing to the American valuation the statutory rate cannot be increased (although the duties on the American valuation will be many hundred per cent. more duty than the rate on the foreign value), but if the rate of duty applied to the American selling price is not sufficient to equalize the difference in cost, naturally the difference in cost must remain unequalized, and thus the cost formula falls down and the Executive cannot equalize under the statute.

A proposed amendment by Senator Walsh (Montana) to strike out sub-section (c), because it departed from the cost-difference formula, was deliberately voted down (Con. Rec. Vol. 64, part 2, pp. 11226, 11229; August 11, 1922). Mr. McCumber (Con. Rec., p. 12191, 2nd Col., August 10, 1922) frankly said the real thing that the President is to determine is the conditions of competition in our market. Therefore, it appears that power was lodged in sub-section c to depart from the cost difference formula.

5: *He can change the classification* (Mr. Pomerene: Con. Rec. August 10, 1922, p. 12221—1st col.).

Many articles in the dutiable list are classified by schedule, class, name, and by paragraphs. He has the power to say that the statutory classification must be changed to "equalize". Suppose certain things, by judicial decision, have been given a legal classification, in which undisputed rules of construction and rules of component material of chief value, chief use, similitude, wholly or in part, etc., had all aided in the court's conclusions and decisions. This could all be swept aside, and things in chief value of cotton (paragraphs 907-908, 910, 911) or things in chief value of wool (paragraphs 1107, 1108, 1109-1110) could be classified in disregard of the findings of the judicial branch. Imported articles have been classified together according to their genus and species, and placed in paragraphs of tariff acts by themselves. This, Congress has been doing for many years, for various reasons, one of which is to secure a uniformity and consistency in classification with respect to the general scheme that crude and semi-finished articles should receive graded upward rates not as high as fully finished articles. This is the essence of tariff legislation. In the first Act creating a Tariff Commission, it was only given the power of advisorily suggesting to Congress what classifications should be made. Congress was formerly very careful to reserve the right of classification to itself. Under this scheme Congress has abdicated that duty and right to the President. It was not willing to give it to a Commission, but it is willing to give it to the President—a distinction without a difference.

6: He can take into consideration and determine the difference in the wholesale selling price of domestic and foreign articles, in the principal markets of the United States.

7: He can take into consideration and determine advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country.

8: He may take into consideration and determine "any other advantages or disadvantages in competition."

9: He has the power, under sub-section (c) in ascertaining the differences in costs of production, to do four things.

A. Differences in wholesale selling prices: This has nothing to do with cost of production. Yet in almost every tariff report to the President, the selling prices are used as a factor in determination of the differences in costs. The Tariff Commission's own statements in the Appendix (P. 103, 112, 121) show this and also show that in considering retail prices estimation of profit has been made to arrive at a wholesale price.

Proceeding to the fourth part of the section—"Any other advantages or disadvantages in competition": How is he to measure these in dollars and cents? (Con. Rec., August 10, 1922, p. 12217, 2nd col., and p. 12218, 1st col.)

Mr. Walsh (Con. Rec., p. 12217, 2nd col., at bottom, p. 12218, 1st col., at top):

"Everybody realizes that many elements enter into the matter of competition between traders in the same commodity. Many goods sell in this country—particularly women's clothes and perhaps also fabrics of various kinds that are of foreign make—simply because they are of foreign make. One goes to a tailor, who tells him, 'Here is a domestic piece of goods, and here is one of foreign manufacture.' The price is

fixed upon both, but the tailor calls attention to the fact that the one piece is foreign goods, expecting that that will attract the customer, who will pay a higher price for that kind of goods. No one can gainsay the fact that because many articles are of foreign manufacture they command a higher price upon the American market. How shall the President convert the advantage which the foreigner has because his goods are of foreign make, into dollars and cents and thus determine the rate which he is called upon to fix?

"The amendment as originally drawn provided that the President was to take into consideration any advantage arising from the laws. That language is not found in the proposition as it is amended. It now reads 'any other advantages,' but it is really here in effect, although not so expressly stated.

"It is contended that the foreign manufacturer and foreign producer of goods have a decided advantage over our producers in this country because the manufacturers and producers in foreign countries are allowed to combine, while our manufacturers and producers are forbidden to combine, an advantage which must be converted likewise by the President into dollars and cents in order to arrive at the rate which will actually equalize competitive conditions.

"A multitude of factors enter into competition that defy reduction to a mathematical basis."

Preliminary Argument.

It is submitted that, in the forefront of all thought should be that this is taxation; fundamentally different from other kinds of legislation.

The question here is solely one of taxation. It is fundamentally different from other kinds of legislation. Therefore, this consideration must always be present in dealing with every phase and detail of this question.

We shall show that the difference in cost of production at home and abroad cannot be certainly or definitely ascertained.

That differences in cost cannot be found except *arbitrarily,*—by opinion, conjecture, guessing, averaging, deciding between different methods, exercising judgment, etc. There is no judicial review, nor could there be. The levy is a political act and there is no record for review.

There is no policy. *The cost of production formula is no policy at all.* To call differences in cost of production a policy does not make it so, especially when all the statutory things and other things present are exposed, examined, and understood by themselves, and in their juxtarelationship. The various and sundry things to be done, and which are done, are each essentially different in their scope, purpose, and effect, and even vary within their respective classes; if class can be found for them. These various things entering into the attempted ascertainment of facts destroy each other by conflict and being not homogeneous, no definite thing called "policy" can emerge from, or be born of them. These various things cannot be put together as structural shapes, with which and upon which, the house can be finished as a concrete whole. Therefore, the statute fails.

> "It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." (United States v. L. Cohen Grocery Co. (255 U. S., 81; 41 Sup. Ct. Rep., 298, at 300, 1st col.)

The Interstate Commerce cases, the Countervailing Duty cases, and the Currency and Appraisement cases, all dealt with different subject matter; and involved no question of delegation.

This is a case of first impression. It is an innovation; an experiment. Field v. Clark (143 U. S., 649), is clearly distinguishable, as are all the other cases relied on by respondent. Never before has the attempt been made by the legislative branch of the Government to turn over to the Executive branch the power to re-write an whole dutiable schedule of a tariff act. If this be constitutional then all kinds of taxation, inheritance, income, internal revenue, can be similarly fixed by the Executive.

In a recent historic opinion in Myers v. United States (272 U. S., 1; 47 Sup. Ct. Rep., 21), the Chief Justice of the United States says:

> "Their union under the Confederation had not worked well as the members of the Convention knew. Montesquieu's view that the maintenance of independence as between the legislative, the executive, and the judicial branches, was a security for the people had their full approval. Madison in the Convention, 2 Ferrand, Records of the Federal Convention, 56 Kendall v. United States, 12 Pet. 524, 610; 9 L. Ed. 1181. Accordingly, the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate *in all cases* in which they were not expressly blended, and the Constitution *should be expounded to blend them no more than it affirmatively requires.* (Italics ours.)

To that conclusive statement of the rule of construction concerning the separation of powers we appeal, and upon it we confidently rely for a holding by this court reversing the judgment below.

Also in Evans v. Gore (253 U. S., 245; 40 Sup. Ct. Rep., 550), Mr. Justice Van Devanter said:

> "The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers, the legislative, the executive, and the judicial, in separate departments, each relatively independent of the others; and it was recognized that without this independence—if it was not made both real and enduring—the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed, or swayed by the other two, especially by the legislative."

It will not be disputed that the President can neither legislate nor levy a tax.

Here the President must choose between alternatives or "vary conclusions" in fixing the amount of a future tax.

To permit him to do so "blends" the executive and legislative powers more than the Constitution affirmatively requires, nay, even against what it expressly forbids.

A supposed standard, which is no standard at all, an uncertain indefinite formula, which is not a fact-finding formula, an alleged policy which is attempted to be expressed by a mere shadowy jumble of confusing and contradictory words, will not avail to avoid the principle so clearly stated by Chief Justice Taft, and thus blend legislative powers with executive powers.

The Constitution should not be so expounded as to permit the President in his discretion to fix the amount of the future tax rate under the guise of an alleged finding of fact, which alleged fact can neither be accurately nor certainly ascertained.

The clause in the Constitution (Article I, Section 1) which carefully deposits legislative power solely in the people's representatives in Congress, reads as follows:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The much debated clause (Article I, Section 8) which with equal care and jealousy deposits in the Congress alone this power to destroy, reads:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; * * *."

If these words of the grant to legislate and the grant to tax do not mean that the Federal Executive can neither legislate nor tax, they mean nothing.

They thus comprise a limitation on the right of Congress to delegate to the Executive either power. This is not strictly speaking, a limitation on the legislative power itself, or the taxing power itself; but upon the right of Congress to delegate either taxation or legislation.

In Boyd v. United States (116 U. S., 616, p. 635), it was said:

> "It is the duty of the courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be '*obsta principiis.*' We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become *developed by time* and the *practical application* of the objectionable law." (Italics interpolated.)

In Truax v. Corrigan (257 U. S., p. 312; 42 Sup. Court Rep., 124, at p. 131), it was said:

> "Classification like the one with which we are here dealing is said to be the development of the philo-

sophic thought of the world and is opening the door to legalized experiment. *When fundamental rights are thus attempted to be taken away,* however, we may well subject such experiment to attentive judgment. The Constitution was intended—its very purpose was—*to prevent experimentation with the fundamental rights of the individual.*" (Italics interpolated.)

An illustration of the radical innovation in tax legislation here attempted.

All revenue legislation for changes in tax rates must be started in the House of Representatives. The people's representatives in the lower House alone can initiate the levy of a new tax; or the change of an existing tax rate. Once a customs duty is fixed by law, an amendment by a law changing the rate of duty which was first introduced in the Senate and passed by it, before action by the House, would be void.

Although Congress itself can only tax (or change an existing tax rate) in this limited, confined way, by the initiative of the House, the act in controversy provides machinery for the change of a customs tax rate by the initiative of those outside the Halls of Congress, i. e., by the President requesting an investigation, or upon the initiative of the Tariff Commission, or upon the initiative of a domestic manufacturer, or importer, or a consumer petitioning for a change of rate.

The machinery for changing a Congressional rate fixed in the dutiable paragraphs of the Act can only be put in motion by these outsiders. If none of them makes the start the Congressional rate fixed in the Act remains undisturbed.

In United States ex rel. Norwegian Nitrogen Products Co., Inc. v. Tariff Commission, decided April 11, 1927 (274 U. S., 106; advance sheets) Mr. Justice Stone said:

"Under Section 315 (c) and (e) of the Tariff Act of 1922, the President is given authority to require an investigation by the Commission and it is its duty to make one when so required. There is no other provision of the Act placing any duty on the Commission to make such an investigation. When not so requested by the President action by the Commission is discretionary. Under its rules, it is optional with it whether it will employ its resources for investigation sought by an interested party."

Thus, some one entirely outside the Halls of Congress must start the executive machinery which may result in a change of the statutory rate, i. e., in an amendment of the rate fixed by Congress substituting a new rate of tax by executive action.

This is difficult to reconcile with Section 7, of Article 1, of the Constitution, which provides that:

"All bills for raising revenue shall originate in the House of Representatives; * * *."

This vividly portrays the radical innovation here attempted from all previous tax legislation.

General Argument.

In this case we challenge the constitutionality of the so-called Flexible Tariff, as embodied in Section 315, of the Tariff Act of September 21, 1922, as taxation by executive fiat; hitherto unknown in our history.

We challenge the alleged standard on which it purports to be based—difference in cost of production at home and abroad—as no standard at all, as incapable of definite ascertainment, the result depending on the will and inclination of the President; as involving executive discretion and judgment at every stage of a complicated, confused

and involved process. Consequently the alleged finding under it necessarily becomes a mere discretionary guess—a decision between different results—in order to fix the amount of the equalizing tax. That is the exercise of the very essence of the legislative trust, and of the power to fix the tax rate committed by the people to Congress alone.

We note here in determining the difference in cost of production at home and abroad the President may consider "any other advantages or disadvantages in competition." This is not related to difference in cost of production—has nothing to do with it. Yet it has been cited as used in every proclamation issued by the President.

If a finding can be made on "any other advantages or disadvantages in competition", then no argument is necessary to show the unconstitutionality of this act. Every one must admit, that an executive finding of a tariff rate based upon the *differences between all advantages and disadvantages in competition,* is purely an act of legislation and, therefore, unconstitutional.

Congress itself admitted it when it amended this very scheme as first proposed, for executive fixing of tariff rates upon the *differences in competitive conditions* at home and abroad, and substituted *differences in cost of production* at home and abroad. There was a fight, however, and the radical advocates of this delegation successfully insisted on the absurdity, as embodied in sub-division (c), that the President should still use "any other advantages or disadvantages in competition" in finding the difference in cost of production at home and abroad.

Section 315 is unconstitutional as an illegal delegation, because executive fixing of tariff rates, based on the difference in "advantages or disadvantages in competition," is plainly and unmistakably on its face an illegal delegation of legislative power and taxing power, irrespective of the claimed legality of a finding based on differences in cost of production.

We assert that when the executive fixes the amount of

the future tax rate (under and within the limits provided by Section 315) he taxes the citizen; he legislates for the people; he exercises the power to destroy. If exercised within those limits no court can review his act; nor stop it because confiscatory; nor examine it to see if it is based upon legally sufficient evidence; nor quash it if flatly contrary to all the evidence, i. e.,—an arbitrary fiat; or because it ignores the Tariff Commission's finding (as has already come to pass in sugar and linseed oil); nor enquire into his motives or good faith in acting or failing to act. It does not involve a justiciable subject matter. The courts cannot fix the future tax rates, nor review the discretion which such determination necessarily involves. It is not subject to judicial review, because it consists of the purely legislative act of fixing the amount of a future tax, i. e.,—the purely political act of levying a new tax.

If Section 315 is constitutional the express constitutional prohibitions confining the power of legislation, and particularly the power of taxation, to the people's representatives are completely broken down. All lines of demarkation between legislative powers and executive powers are forever removed. Such distinction becomes a mere play upon words. Such a holding completely nullifies the language of Section I, of Article 1, and Section 8, of Article 1, of the Constitution. Such a holding authorizes and invites Congress to pass its entire responsibility over the levy of taxation to an irresponsible bureaucracy, which before this act had not yet invaded this field; which, up to this, has never been commissioned to fix the amount of the tax rate; either for customs taxes, income taxes, inheritance taxes, or any other taxes. The principle here involved necessarily affects all taxation as well as customs taxation. If the door of this attempted delegation is opened for one kind of taxation, it is opened for all.

Once opened it gives blanket authority to Congress to abdicate its entire trust over this power to destroy, by

merely declaring a few general principles of taxation; one for customs, another for income tax, another for inheritance tax, etc., leaving the bureaucracy to do the rest.

If the Flexible Tariff is sustained, Congress can commit the ascertainment of the actual rate of every Federal tax the citizen must pay, on income, on inheritance, on customs, on everything, to the choice, judgment, and discretion of executive functionaries.

This is the revolution in the American system of taxation for which this so-called flexible tariff opens the door. From that conclusion there is no escape.

Judge Brown, of the trial court, in his dissenting opinion, points out a number of patent instances, as shown by the Tariff Commission's Reports, of the necessary exercise of judgment and discretion leading to different results in making findings of foreign and domestic cost differences. They have actually decided:

(1) What area (if not the whole United States) they shall cover to compare with the competing Canadian section in the production of, say, hard spring wheat, and whether winter wheat shall be included in the investigation; the tariff rate applying to all wheat?

(2) Whether costs of one current year should be compared or an average over a period of years, say three, taken for comparison.

(3) Whether transportation costs of the foreign and domestic articles to a common market place should be included or excluded from costs of production.

(NOTE.—If transportation costs to a common market place can be considered, which shall be chosen as between the differing cost of transporting goods, say to a common market in New York, from producers located in Texas, California, Michigan and Maine. An attempt at averaging these would necessarily be arbitrary and plainly lie in discretion. No averaging would satisfy the long-haul

producer. If there happens to be more than one common market place, the difficulty, uncertainty, and hence the discretion, increases.)

(4) Whether the difference between foreign and domestic costs should be measured between points representing a weighted average cost in the two countries, respectively, or at a point representing a cost at or below which the bulk of the American product is produced.

(5) Whether land in the competitive area investigated to determine an agricultural duty should be taken at its rental value or as for a fair return at interest upon its capital value.

(6) What division of costs shall be apportioned between principal and by-products, shown by Page, to be necessarily arbitrary.

(7) The readjustment *vel non* of actual costs to an estimated production equivalent to a given percentage of plant capacity.

After citing these actual decisions Judge Brown says:

> "The result of any attempt to choose any method or rule whatsoever for averaging the costs of many different producers, whether based upon 'a weighted average cost' or upon a 'bulk line production cost' or upon any other so-called scientific method, necessarily becomes a mere discretionary guess, i. e., a question of where we choose to draw the line. The final figure arrived at manifestly must depend upon the particular method of averaging which is selected. A method does not become accurate, and its result becomes certain, by merely giving the process a scientific name. A dream does not become a reality through descriptive terminology. A guess does not become a fact by calling it a finding.

* * * * * * * * *

> Any generalization from such varying factors, however intelligently and painstakingly arrived at by executive authority, must, in the nature of the case, be largely a matter of individual opinion and judgment. As all the factors which make up the finding are themselves variable and uncertain it is impossible that the generalization from them could attain to greater certainty or be any more than a rough approximation like the finding of damages, in tort, by a jury."

In the Appendix H and J, pages 98 and 106, are the Tariff Commission's own preliminary statements, which describe the details of what *must be decided* by them; showing at a glance that it would be inaccurate, false, and misleading to attempt to describe the operation of Section 315, as a *mere fact-finding process.* On the contrary, they unmistakeably disclose the exercise of the legislative discretion at each step in a complicated investigation.

There is absolutely no governmental necessity for the attempted delegation of customs taxation. Congress, without such attempt at abdicating its functions, has itself fixed the rate of all tariff taxes, and of all other Federal taxes, since the formation of our general Government. The excuse can not be advanced here, as in delegations under the commerce clause (all of which are subject to judicial review for confiscation or arbitrary action), that the wheels of Government will stop if this Congressional abdication of power and responsibility is not permitted. That claim is completely negatived by the rates actually fixed in the dutiable paragraphs of this very Act, and all other tariff acts previously passed by Congress, during peace and war, from the beginning.

This is a case of first impression. Section 315, in the breadth and radical scope of its attempted delegation, is totally unlike any legislation heretofore passed by Congress. It is pregnant with dangerous new possibilities,

changing the whole future course of our constitutional history. Nothing approaching it, or similar to it, has heretofore been attempted.

Conclusive statements have been made by many distinguished economists and statesmen; some of them engaged in the actual operation of this law showing that the finding which this Section 315 directs, of the alleged difference in cost of production at home and abroad, cannot be made *without the exercise of discretion, choice* and *judgment* in using or discarding different factors, *in deciding between different results.* That is the legislative act of fixing the amount of the future tax rate which the Constitution forbids the Executive to do (See Appendix D, p. 93; E, p. 94; G, p. 95; K, p. 127; L, p. 143).

The case of Field v. Clark, 143 U. S., 649, is the only *tax* case in which the question here at issue, i. e., the legality of the delegation of the power to tax, was raised in brief or argument, or discussed in the opinions of the Supreme Court. The spirit and principles of that case flow from and are maintained on (1) reciprocity; (2) retaliation; the one bespeaking the other. There was no grant of power to determine the differences in cost of production (the fact that a foreigner's cost of production is less that our costs is not discrimination against us); to change the classification; to change from a foreign valuation to an American valuation; to amend the statutory rate, upward or downward; to determine price competition; to determine other advantages or disadvantages in competition.

In the Field case four tax rates were named in the act itself. The President did not calculate, estimate, speculate or guess at their amount, or use an indefinite formula; as he does here.

In the Field case the President was given power to put the statutory rate into effect against such countries as to which he could find as a fact discriminated against our export trade by their laws. This was a very simple find-

ing, based upon a certainly ascertainable fact, concerning which no intelligent minds could possibly differ. This, the majority of the Supreme Court held, involved no discretion to make the law on the President's part.

In the Field case the President most emphatically *did not investigate trade conditions in the United States,* and compare, balance and measure them with *competitive trade conditions in foreign countries,* as the Court of Customs Appeals erroneously stated and as our opponents asserted in their brief below, and in their brief opposing certiorari.

On the contrary, he simply ascertained *from the terms of the foreign law,* whether a country exporting sugar, coffee, tea and hides to the United States discriminated by its law against our *export trade.*

He looked in the foreign statute for a discriminating tariff rate against American goods. If he found it there he proclaimed in effect the tariff rates, written by Congress for that contingency, on sugar, coffee, tea and hides.

It is interesting to note how far the doctrine in the Field case is attempted to be extended by the Court below for (R., 92), in adopting the theory of our opponents, the Court said:

> "We are unable to perceive the difference. In each case, the effort of Congress was to protect products of the United States which might be threatened by injurious *competitive products from abroad*—in one case by unfair governmental methods, in the other, by differing business conditions." (Italics ours.)

With great respect, we submit that statement is a complete misunderstanding of what the President did in the Field case, which had nothing to do with protection of *American* products in our market, but related solely to *retaliation* against the *foreigner's goods* for his discrimination against America's *exports.*

The plain inference from Mr. Justice Harlan's opinion in the Field case is that, had he found (as the dissenting

justices claimed) that the reciprocity provision involved executive discretion and judgment, choice between different results (as does the flexible tariff), he would have held the Act unconstitutional.

No one can reasonably contend that using "any other advantages or disadvantages in competition," in order to evolve a tariff rate, is merely finding a "fact" on which a statute can be made to take effect or depend. Nothing indefinite like that was in the reciprocity law sustained in Field v. Clark.

Difference in cost of production is no standard, because it involves choices between different results at every stage, but "any other advantages or disadvantages in competition" is no standard on its face. There is nothing definite or certain about the expression. Yet it is there in the Act, and it cannot be ignored. Its presence makes Section 315 unconstitutional, irrespective of the unconstitutionality of the "difference in cost of production" formula.

Under the flexible tariff the President fixes the rate of a future tax, as a result of estimating costs in individual factories or farms, first chosen as representative, and after finding what goods are like or similar, and which is the principal competing country, and after arbitrarily (there is no other way) separating costs of joint or by-products; then, after choosing between a weighted average cost, or a bulk-line cost (itself an uncertain term), or some other method, and then applying the chosen method of averaging at the desired point, and then averaging the cost of transportation to a common market; and, after having chosen whether the investigation shall cover one year or five years, with changing conditions, then comparing these with foreign costs arrived at in the same uncertain and indefinite way; on top of all this, using "any other advantages or disadvantages in competition" and "selling prices" as mysterious further methods of finding differences in cost of production.

Discretion, choice between different results, decision and judgment, is experienced at every stage of this process.

To compare such an elaborate exercise of the mind with the simple process of looking into a book, as in the Field case, in order to detect foreign discrimination against our export trade is impossible. The two processes are intrinsically and fundamentally different. There is no comparison. To make such a comparison is as legally absurd as to liken the flexible tariff to the ad valorem appraisement of merchandise.

The latter claimed analogy is tantamount to saying that there is no difference between fixing the rate of a future tax for all importations and applying an existing rate to a particular shipment on a day certain from a particular foreign factory. Or that an act of new legislation is the same thing as a legal contest over the application of an existing law to a particular importation.

There is no substantial dispute in this case that the action of fixing a tariff rate under Section 315 is legislation. The comparison is between the action of the President in merely finding a simple fact of discrimination against our export trade, upon which the rate already named takes effect, as in Field v. Clark, or conjecturing differences in costs of production while considering *"any other advantages or disadvantages in competition,"* and "selling prices" from which complicated action (above described) a new rate of taxation emerges.

The former this Court held in the Field case could be legally done. For the latter (Section 315) there is no legal precedent or authority. No case has sustained any tax statute remotely resembling it.

It is this new adventure in law making, this new experiment in the delegation of the taxing power to the Executive, which we attack as unconstitutional.

The countervailing duty cases, Downs v. U. S., 187 U. S., 496, and Nicholas v. U. S., 249, U. S., 34, and the currency cases, such as Cramer v. Arthur, 102 U. S., 612, and Arthur v. Richards, 90 U. S., 259; Hadden v. Merritt, 115 U. S., 25; U. S. v. Klingenberg, 153 U. S., 93; are not

in point, because in them no question was raised of delegating legislative power or taxing power; and of course no such question was discussed in the opinions of the Supreme Court.

The tax levying power stands in a class by itself, because, being the exercise of the power to destroy. The Executive action under the flexible tariff is not subject to judicial review for confiscatory or arbitrary action or unreasonableness, or to review the discretion imposed in fixing a new tax rate within the limits prescribed by the section.

The Solicitor General (now Mr. Chief Justice Taft) said in the Field case, 143 U. S., 649, No. 1052, October Term, 1891, in brief for the United States, page 87:

> "If the tariffs of the foreign countries are reciprocally reasonable and equal toward the productions of the United States or are made so, then their sugar, hides, coffee, and tea are to come in free; if the foreign tariffs are not so reciprocally equal and reasonable, then certain duties are to be imposed on the four articles from those countries. The President is required to determine whether the foreign tariffs are reciprocally equal and reasonable to merchandise of the United States or not, and when he determines that they are not, he must proclaim the fact, and the free list is suspended and duties are imposed."

Compare this with Section 315 changing the whole dutiable schedule within a range of 100 per cent. from the highest changed rate to the lowest changed rate, and even more if American selling price is used.

POINT 1.

The difference in cost of production at home and abroad cannot be found as a fact without using discretion and judgment, choice between different results, at every stage, thus expressing the exercise of the legislative will.

In the Appendix are statements from:

A. Thomas Walker Page, of the Institute of Economics, Chairman of the Tariff Commission just prior to the passage of this law.

B. Prof. F. W. Taussig, of Harvard, who was the first Chairman of the Tariff Commission until succeeded by Dr. Page.

C. Philip G. Wright, also of the Institute of Economics and formerly an expert employed by the Tariff Commission.

D. Thomas O. Marvin, present Chairman of the Tariff Commission, who succeeded Dr. Page.

E. Alfred Pearce Dennis, the present Vice-Chairman of the Tariff Commission.

F. Dr. W. H. Wynne, of Williams College.

G. Former President, William Howard Taft, and President Coolidge, Senator Thomas J. Walsh and Senator Reed of Missouri, and Senator Underwood.

It conclusively appears from their combined statements and from the preliminary statements of the Tariff Commission (Appendix H and J).

(1) That "the differences in cost of production at home and abroad" presents an alleged formula which in no reasonable sense of the word describes a fact-finding process. On the contrary, discretion, judgment, choice between different results, are necessarily

involved in making the "findings of cost difference" required.

(2) That "representative" costs among many different producers must be selected.

(3) That choice must be made between different methods of averaging, leading to different results.

(4) That costs of by-products and joint products must be allocated by some arbitrarily chosen rule.

(5) That the period of time the investigation is to cover, necessarily leading to different results, must always be decided.

(6) That merely deciding what are like or similar goods, involves nice and delicate discrimination.

(7) That deciding what, for purposes of the statute, is the principal competing country, often involves uncertainties.

(8) That the so-called bulk-line and weighted average methods of averaging, themselves involve uncertainties in application.

(9) That from the beginning to the end of the investigation, many things have to be decided and their application determined, about which reasonable minds are sure to differ, and which involve a legislative discretion.

The section provides for (1) "Like or similar articles; (2) "wholly or in part the growth or product of competing foreign countries"; (3) "principal competing country."

As to (1)—"Like or similar articles": This must be determined at the beginning of every investigation of production costs. First then—what is an article? Second—With what foreign article is the domestic article to be compared? Is an article something having positive physical form—dimensions, or a gas, liquid, powder, or some impalpable thing? It is true that many articles, not physically identical, come in competition. Could a domes-

tic article, subject to low-cost competition, be protected (and that is the object of the statute) by raising the duty, if the foreign article was better and not just like the domestic article? Competitive articles might fall under general designations, but may be produced in varying grades, so that the foreign article would meet a demand quite different from that of the domestic article. Articles in a class are of different grades. The cost of the high-grade could not be compared with the low-grade. Therefore, if the cost differences are to be found to "equalize", some allowance must be made in the judgment of the delegee, to represent different elements. The finding of the President in such a situation would be an impossible task; except arbitrarily. The legal question is—would such process and questions constitute a *finding of "like or similar"*. It can only be done by constructing an artificial or ideal identity.

Even physical identity has limitations. Wheat is wheat; yet in making cost comparisons of wheat it was confined to *hard spring wheat,* produced in three western provinces of Canada, and four States, Minnesota, North Dakota, South Dakota, and Montana, and did not include *hard winter wheat,* produced in Nebraska and Kansas. Note Wheat and Wheat Products, Report of United States Tariff Commission, to the President (Appendix I, p. 102).

What we have said here as to "like or similar", by a parallel of reasoning, applies equally to "whether wholly or in part the growth or product" and "principal competing country."

Consider a raw commodity of the United States and a "like or similar" imported article which has been partly manufactured from raw material produced in another country than the country of exportation, or principal competing country. Does the comparison require production-costs of only one country, or both countries, to be taken? Can the price paid by the foreign manufacturer for the raw material be regarded the equivalent of costs, or are the conversion costs in a foreign country to be added to

the raw material? Nakedly raw material costs include no profit; yet in the competing country manufacturing the raw material of the other country, profit does figure as an element of cost.

The costs of production are to be measured by the "principal competing country." Importations may come in substantially equal quantities from different foreign countries, or in one year larger quantities from one than another. The next year this may be reversed. Production costs are never precisely the same in two countries. The application of the amended rate is in prospective and the ascertainment of the costs is retrospective. It therefore may happen that an increase in duty, measured by the country having the lower costs, may be applied to importations from a country having a higher cost production. How is the President to equalize and find a cost difference as a fact at the time of proclamation?

Choosing what are called representative costs involves the exercise of legislative discretion; exercised before one commences to allocate the separate costs of joint production or before one chooses an arbitrary rule for averaging the costs of many different producers or before one chooses between the many other alternatives involved in this process.

The Tariff Commission cannot examine the cost of raising wheat in every farm in the United States, so the Commission must designate so-called representative farms and examine them. This discretion of selection, and how it is exercised, must affect, and does affect the final result. It is obvious it would always be a matter of opinion as to which farms were representative. How can this be called a *mere fact-finding process?*

The necessity of choosing representative producers will arise in every investigation of every product of the farm or factory produced all over the country. The Tariff Commission's action in wheat investigations (referred to in Appendix I, p. 102) shows that certain things were

selected and others rejected. Certain things were held to be representative and others non-representative. The tariff rate applies to all wheat, hard and soft, summer and winter; yet the Tariff Commission did not include all of these, but confined itself to considering only one kind of wheat. Nor did it take all the territory of the United States into consideration. The Government's position must be that this court must hold that all this is a mere fact-finding process and that it makes no difference whether the Executive in dealing with complex and multiplicity of questions and things, which cannot be accurately determined, which require discrimination and judgment and choice at every stage of the process by the delegee, is not legislation, but simply a mere fact-finding process.

We now refer again to and continue the preliminary statements of the Tariff Commission (quoted in full in Appendix) to expose through detail the non-existence of the fact of differences in the *cost of production per se* at home and abroad, and that in any event the proclaimed finding of fact is not a mere finding of fact; is not a definite finding of fact; and is only arrived at by the use of legislative discretion, through the exercise of judgment, conjecture, speculation, guess and choices, and arbitrary action.

Consider the following questions upon which by their preliminary statements the Commission asked for light and discussion at their hearings.

A. Purchasing expense abroad of importers in marketing hats in this country is sometimes taken as a factor in cost of production.
B. Grouping of competitive (?) types.
C. Costs may be computed in several ways. In the Cheese case, three ways for selection were open.
D. Income factors, sales, allocation, method. In relation to farming, distribution of costs was made on the *allocation method.*

E. What period of time is to be taken for costs in this country and abroad? Is it 1, 2 or 3 years? Note Wheat and Wheat Products; Sugar.

F. Do differences in economic, financial, and climatic conditions in *various areas* affect the validity of book-values and for comparison purposes? Sugar problem.

G. (1) What is to be done when the data of one company is unreliable? What is to be done when cost data cannot be obtained? (2) *What is the area of competition?* What is to be done when foreign cost data cannot be secured? What is to be done if there are substantial chemical or physical differences, as well as differences in grade?—Calcined Magnesite question.

H. Is it permissible to resort to consular invoice prices and make estimated deductions therefrom for profit contained, or supposed to be contained therein, in order to fix a foreign cost?

I. Is classification of size of an article or by degree of purity to govern?

J. Depletion of royalty; costs of production at points of competition; are questions involved.

K. Shall a wet season (1923-1924 in China) be taken in consideration to determine the year's period?

L. When costs taken by field investigation involve a plant whose production in relation to its capacity is considerably below normal, who is to determine normality? Sodium Nitrite problem.

M. Shall the cost of production include a fair return on capital employed, or shall the Commission take into account only such interest as has been paid on borrowed capital?

N. There are at least three possible alternatives present in arriving at cost differences: (1) The measure of difference between the ascertained foreign cost plus ocean freight and the ascertained domestic costs plus the short haul freight. (2) The measure of difference

between the ascertained cost plus ocean freight and the domestic cost plus the long haul freight. (3) The measure of the difference between the ascertained foreign cost plus ocean freight and some kind of average of the domestic freights.—This involves the determination of a common market and the principal competing market.

O. Farm costs—This involves one of the greatest combination of uncertainties. Farmers do not keep adequate records of their costs. Records are kept of receipts. Is the farmer's individual labor, and the individual labor of the farmer's wife or children, their food consumption or maintenance to be considered as a cost, and how are they to be definitely ascertained? What is a representative farm? What are representative prices? What is a principal market? What years are to be taken? What areas cover? What part does the long and short haul play? What is the principal competing country? Is the principal competing country continuing, or only occasionally a competing country? Are farming conditions stable so that estimated costs arrived at for a certain period will measure the difference for future periods?

POINT 2.

The fact that the cost of joint products and by-products cannot be separated except arbitrarily, that alone, and by itself, makes Section 315 unconstitutional.

A chain is no stronger than its weakest link. As a matter of common knowledge, in modern industry, at least 50 per cent., probably 75 per cent. of all articles of commerce are either joint products or by-products. Relatively few farms or factories produce one single article.

Every one must see that the cost of joint products and by-products cannot be separated except arbitrarily for the simple reason that their *separate costs do not exist.*

There is no rational process by which the separate cost of wool can be separated from that of mutton, of gasoline from kerosene and lubricating oil, of hides from beef, cotton from seed, milk from butter, cows from both, or bran, shorts, etc., from wheat and flour, or of any other joint or by-products.

There is no separate cost to find. Making an allotment or allocation of so much to hides and so much to beef, for instance, is not to approach or depart from accuracy. Terms of relative accuracy do not apply to a non-existent quantity. We cannot guess at something which does not exist or get near it or away from it. There is nothing there to find. Nothing to compare our arbitrary allotment with. The Tariff Commission did it arbitrarily (there is no other way) by basing costs of joint products on the amount of the separate receipts from each joint product. Page has demonstrated conclusively that this is a purely arbitrary separation bearing no relation to actual fact. (See quotation below.)

No other method has ever been suggested or can be suggested for dividing the costs between two or more products jointly manufactured. There is no such rational method. Any method which could possibly be suggested necessarily would be equally arbitrary. As before stated something which does not separately exist cannot be approximated or even intelligently guessed at. All any one can say is that he will simply arbitrarily allot so much of the joint cost to A, so much to B, and so much to C. If in so doing he uses some high sounding scientific name for the arbitrary rule he so applies, that does not make it any the less arbitrary. Nor does it make the finding made under such rule *a finding of fact.*

Consequently all "findings" of tariff rates s made under Sec. 315 of joint products and by-product must be based upon a mere arbitrary guess, or allotment.

This the legislature itself may do, but it cannot delegate power to do it to the Executive and truthfully call it a

mere fact finding process. It results from this that fixing of tariff rates under this process for all joint products and by-products is plainly and unmistakably unconstitutional. The Section (315) must operate as a whole. It cannot be constitutional when applied to *singly* manufactured products and unconstitutional when applied to joint products and by-products. That would be a constitutional absurdity. We therefore submit that the non-existence of separate costs for by-products and jointly manufactured products (which are legion) entirely invalidates Section 315, makes the whole scheme unconstitutional.

To the producer it is a matter of little moment how much of the cost shall be allocated to various by-products; that is to say, how much to "a", how much to "b", and how much to "c". But to the tariff-maker, it is a matter of vital importance if he is to put one duty on "a", another duty on "b", and another duty on "c", and he must measure those duties by the difference between the domestic and foreign costs of producing these several things.

Extract from Dr. Thomas Walker Page's book, "Making the Tariff in the United States" (Chapter IV, pages 85, 86, 87):

(85) "Even in a simple pastoral industry, such as sheep husbandry, this problem is encountered. It may be noted in passing that this industry also presents a number of other problems, which arise in determining what are to be accepted as elements of costs. Should rent on the land used and interest on the total investment be regarded as items of cost, and, if so, at what rate? On the other hand, should account be taken of certain indirect but valuable considerations, such as the destruction of weeds or the improvement of the soil; and if so, how can their value be appraised? But aside from any question as to how the total cost is constituted, what is the basis on which it can be divided between the wool and the meat pro-

duced? The existing tariff law imposes duties at different rates on sheep, on mutton, on lamb, and on several varieties of wool. If these duties are to be measured by the difference between domestic and foreign costs, the total costs of sheep husbandry must in some way be distributed amongst the different products on which the duties are levied.

The basis of distribution adopted by the Tariff Commission is doubtless as good as any. Thus the commission reported that in Montana during 1919 the expenses for 82,122 sheep were $9.93 a head. This was made up of labor, interest at 6 per cent on in-
(86) vestment, feed, fees and rental, shearing, depreciation and miscellaneous. It is clear that no important item except shearing was incurred exclusively for a single product. Expenditures for labor, feed, and the rest were made for producing both meat and wool. The commission divided the joint costs between these two products in proportion to the sheep owners' receipts from each of them. In that year it happened that 61 per cent of the total receipts in Montana came from wool and 39 per cent from mutton and lambs. As the average amount of wool sheared was slightly over eight pounds per head, this method of division showed the cost of wool in Montana to be more than 76 cents a pound. In the other range states it varied that year between 32 cents in Texas and about 49 cents in Idaho.

The fallacy of the method is obvious, since it makes it appear that the smaller the receipts from either product the lower will its cost be. This is clearly contrary to fact. Thus a hard winter with feed scarce and dear, followed by bad weather during the lambing season, compels the flock owner to make unusual outlays to save any lambs at all. In spite of his efforts the lamb crop is apt to be poor and the lambs stunted and unable to make satisfactory development, so that

his receipts from them is small. Under such circumstances the commission's system of accounting would show that the cost of the lambs was exceptionally low and that of wool proportionately high; and by a pernicious paradox if the lamb crop were a total failure, the lambs would have cost nothing at all. Conversely,
(87) conditions favorable to a good lamb crop would appear to raise the cost of lambs and thereby lower the cost of wool. It should be noted, however, that receipts vary not only with conditions of production but also with changes in the market, and the price received for lambs is determined by causes quite remote from those that determine the price of wool. Thus a rise for any reason in the price of wool would appear, regardless of the actual outlays incurred, to lower the cost of growing lambs."

We also submit a statement made by Mr. Page before the Robinson Investigating Committee of the Tariff Commission in Senate Resolution No. 162, pages 45 and 46:

"Mr. Page: I think that there are enough uncertainties in business, even under the best of conditions, and I think that the feeling of uncertainty and of insecurity is greatly increased when it is impossible for the producer or merchant to know at what time the rates of the tariff are going to be changed. When they feel, at least, that they are under a constant threat of a change in the tax on imports, they cannot, with any feeling of safety, make their commitments for future operations. It is, therefore, a deterrent to business. It prevents sound business rather than helps sound business. It adds a speculative element which I think is highly undesirable. I might say also that one of the serious defects in the proposal for a flexible tariff is, as I have said elsewhere, the danger that the flexibility will be perverse. *You can not*

make investigations which will justify a change in the rate until the period of production is completed, to which the investigation relates. Now, the following period of production may be subject to conditions that are entirely different from the period which has been under investigation. If, therefore, you change your rates so as to accord with results or investigation of one period they might be totally wrong for the period that follows.

Perhaps I might illustrate that with an example. An investigation of the cost of producing wheat in this country and in Canada, made by the Tariff Commission, showed a considerable difference to the advantage of Canada. Those of you who are familiar with that investigation will remember that the difference in cost was due, in large measure, to a very much smaller yield per acre on American farms. The actual outlays per acre were smaller in this country than in Canada, but the years for which those investigations were made were years of poor yield south of the border and of high yield north of the border. Now, on the basis of that investigation the rate was raised by proclamation of the President. It happens that in the year following that increase of rate, conditions were reversed. They had serious droughts in Canada and their yield per acre was very materially reduced. They had a favorable season on this side of the border and the yield per acre was greatly increased, and if the investigation did cover the subsequent year, to judge from the figures that were compiled by the Tariff Commission, I should say that the likelihood of a change in the rate of duty, if it had been made at all, would have been downward rather than upward."

POINT 3.

There is no magic about the word "finding."

The act of making the "finding" itself has no creative power. Arrived at as it must be, by choosing between different results, that does not make it into a "fact" by such choice or decision, by asserted analogy to the finding of a jury verdict at law or a Chancellor's finding of facts in equity. It is manifest that the operation and effect of a statute prescribing a rate of taxation, or other rule for the future, cannot be made to take effect or depend, upon the result of a jury verdict or upon a Chancellor's decree. Yet such verdict or decree in a contest over disputed fact is absolutely binding upon the parties in a litigation.

Had the "finding" here, as part of a legislative process, the same effect, it would make a conjecture into a certainty by the simple act of compiling or tabulating the guess. *Thus something uncertain and inaccurate would evolve by a sort of creative power into an accurate certainty.*

That is a perfectly proper and legal method of binding parties to a litigation; but has no relation to delegating to the Executive the finding of a fact upon which the operation of a statute can be made to take effect or depend.

As the dissenting trial Judge said:

> "A method does not become accurate and its result becomes certain by merely giving the process a scientific name.
>
> "A dream does not become a reality through descriptive terminology. A guess does not become a fact by calling it a finding."

If it did, the act of making the formal finding would *possess creative power.* The figures calculated would be-

come a fact simply because the President said he found it. That is the result of the Government's position in this case.

The fact to be found here must be such as can be definitely and certainly ascertained and is distinguished from facts determined by litigation. We draw from Judge Brown's opinion (R., p. 57):

> "But here we are *not* dealing with litigation or with something which can be determined by the processes of litigation. We are dealing with the purely political matter of the levy of a tax upon the citizen * * *. This is a political process by which the citizen, acting through his federal legislative agents in Congress, fixes the necessary contributions for the support of the Federal Government." (Italics ours.)

His opinion divides facts (R., 58) into two kinds—*definite* facts and *approximate* facts (R., 56, 57). *Definite* facts are those to which courts refer when they say that the Legislature may delegate the finding of a fact to Executive authority, upon which finding, the operation of a statute *already complete* in itself, may depend. *Definite* facts, as defined by the dictionary, are those which are realities, events, and truths (R., 57). *Approximate* facts are like those found by a jury, with or without punitive damages. He holds therefore, that, the fact here to be found must be in the definite class, but because of the *insuperable* and *inherent* difficulties, the things found (not facts in the definite class) fall in the second class of approximate or indefinite facts.

POINT 4.

There is no argument from necessity here. This completely distinguishes the cases relied on by the Government, which discuss the delegation of legislative power.

The argument from necessity by which some delegations have been justified is based upon the idea that the thing cannot be done in any other way. When it cannot be done by the delegee except by arbitrary guesswork, such argument from necessity completely fails. Congress itself can guess (and no one can challenge), at the difference in cost of production at home and abroad, but that is legislation and not as shown the mere finding of fact. But it cannot transfer such guessing power to another, on the ground of *necessity when the delegee himself cannot do it accurately any more than Congress can.*

For instance, neither Congress nor the delegee can separate (except arbitrarily), the cost of production of joint products, or by-products, which comprise many articles of commerce. What is the necessity then of transferring from one who cannot do it (except arbitrarily), to another, who also cannot do it (except arbitrarily)?

Thus, the argument from necessity completely fails from every point of view.

We have here an impossible, unworkable process. It does not become possible or workable because the person (Congress), to whom the people have committed the power to attempt to do it inaccurately, delegates it to another (Executive), who also must do it inaccurately. We are sometimes governed or influenced by sounds and forms and nomenclature and persons. But shifting forms, changing nomenclature, and substituting other persons, does not render possible what is inherently impossible.

The complete breakdown of any argument from necessity as sanction for Section 315, because Congress has it-

self been fixing tariff rates without difficulty, since the beginning, completely distinguishes the cases cited by the Government where the question of delegating legislative power was *actually* raised and *discussed* by this court.

Congress could not pick out the impure teas to exclude, or discriminate between pure and impure grades of the same tea. Hence in Buttfield v. Stranahan, 192 U. S., 470, this court rightly held that the necessity justified the delegation, because without it the plenary power of Congress to exclude impure merchandise from entry would be ineffective.

After Congress has been fixing tariff rates for 135 years, no one can say that if Section 315 is held unconstitutional, the plenary power of Congress to fix tariff rates has been rendered ineffective.

Note also that the fact of impurity for food purposes was a simple one, easily ascertainable, and easy to apply. Note also that there was judicial review for arbitrary action. See Waite v. Macy, 246 U. S., 606, T. D. 37647.

And so with U. S. v. Grimaud, 220 U. S., 506. There it was necessary for Congress to leave to the Secretary of Agriculture the making of regulations for the protection and preservation of a Forest Reservation. That could not be done effectively by Congress itself. It was impractical to do it in any other way. But even then it was Congress itself which made a breach of the regulations a crime, and Congress itself which fixed the penalty. Moreover the party there complaining had a court and jury pass on him before conviction.

As to the Bridge cases: Union Bridge Co. v. U. S., 204 U. S., 364, Monongahela Bridge Co. v. U. S., 216 U. S., 177, and Hannibal Bridge Co. v. U. S., 221 U S., 194. There it was *impracticable* for Congress to pick out the obstructions to navigation all over the country and separately deal with each. Note also that the fact of obstruction was easily ascertainable by simple measurements. A fact concerning which reasonable minds would not differ.

Moreover, any arbitrary abuse of power by the Secretary of War could have been stopped by the courts.

In U. S. v. Chemical Foundation, 272 U. S., 1. It was necessary in order to effectively use enemy property for the prosecution of the war to make the limitation on the excepted class through the action of the President, fixing the terms of certain sales.

In Field v. Clark (completely distinguished on other grounds in the General Argument, pp. 25, 26, 27), the necessity of executive action was equally apparent, in order to effectively and promptly compel reciprocity by retaliation against a discrimination in a foreign law against American exports. Congress could not promptly and effectively do that itself.

The same necessity clearly appears in the embargo in In Re Brig Aurora, 7 Cranch (11 U. S.), 382.

The above cases are the only cases relied on by the Government below where the question of delegating legislative power was raised in brief or argument or discussed by this court. And the facts and situation of each show conclusively that unlike the case at bar it was impossible for Congress to do the thing in any other way.

Superficially it may seem strange that the power to fix Railroad rates by means of the Interstate Commerce Commission was apparently never directly challenged in this court, as an illegal delegation. But when we consider that the power to charge reasonable rates for public service originated in the Railroad Companies themselves, subject to court review for unreasonableness, and that the right to judicial review for arbitrary and confiscatory action still remains, thus differing in origin and purpose from other delegations, and when we also consider the self evident impossibility of Congress itself fixing all railroad rates, the reason why the able railroad lawyers never claimed it was an illegal delegation of legislative power, becomes apparent.

POINT 5.

The expression in Sub-Section C, "the President in so far as he finds it practicable shall take into consideration * * * ANY OTHER advantages or disadvantages in competition", in itself, renders Section 315 unconstitutional. On account of its presence alone, we submit, this court should declare the section unconstitutional without even considering the question of the unconstitutionality of the "difference in cost of production" formula.

"*Any other* advantages or disadvantages in competition" is a very indefinite, elastic and general expression. It covers anything and everything which makes for business success or failure. It is difficult to think of it as something to be reduced to figures with which to measure the amount of a tariff tax. The use of the words "any other" before "advantages or disadvantages" shows that it was intended to reach far beyond mere cost factors.

It may include a variety of things, such as catchy advertising,—nearness to the central market giving personal contact with large purchasers—esprit de corps—personality in salesmanship—reputation—good will—well known trade names—copyrighted trade-marks—popular fancy for a particular article purchased—executive ability—business management. In fact, about anything and everything the user desires it to mean.

It is to be used "in so far as he finds it practicable." This smacks of legislative discretion. For he decides whether it is practicable to use it or not.

The expression is so indefinite as to mean anything. Had it been stated alone and by itself (and not under the cloak of a method of finding cost differences) no one would have seriously contended Section 315 was constitutional.

Shall this elastic formula of advantages or disadvan-

tages in competition become constitutional merely because it is stated as a method of finding cost differences? If so, the tail would certainly wag the dog.

Basing a tariff rate upon supposed differences in advantages or disadvantages in competition is on its face not a *fact finding* process.

Executive fixing of new tariff rates upon differences in production costs is unconstitutional because involving discretion and judgment, choice between different results, at every stage, *but basing them upon "any other advantages or disadvantages in competition" is unconstitutional on its face.*

We therefore submit that even if the difference in cost of production formula was a mere fact finding process (which it is not) the inclusion of the words "any other advantages or disadvantages in competition" in itself makes Section 315 unconstitutional.

Such a holding avoids the necessity of deciding the unconstitutionality of the difference in cost of production formula standing alone.

In attempting to avoid the absurdity of using differences in "advantages or disadvantages in competition", as a mystical method of finding cost differences, Senator Walsh moved to strike out sub-section "c" (Congressional Record, August 11, 1922, Vol. 62, Part II, 67th Congress, 2nd Sess., p. 11226, etc.).

(In answer to Senator Smoot.)

Mr. WALSH of Montana. If the Senator will allow me, I enter into no controversy with him upon that matter at all. I agree with him that the rule which the Senate has announced in the bill, the differences in the cost of production, is a thing that can not be ascertained. There is no way in which it can be done. But the difficulty about the matter is that the Senate has already declared its purpose to make that rule. Now, we can not extend that rule by saying the cost of production as hereinbefore declared

shall be not only the cost of production but something else besides. The two provisions would be entirely inconsistent. I submit to the Senator that he must go back, if he intends to do that, and remodel the language which has already been agreed to, make it more general in its terms, and then, of course, he can make subdivision (c) as specific as he cares to make it.

Page 11228:

THE PRESIDING OFFICER. The Senator from Montana moves to strike out, as the Chair understands, all of subdivision (c) down to and including the word "competition", in line 5 on page 5, of the amendment of the Senator from North Dakota.

Mr. WALSH of Montana. Exactly. I do that because, according to my understanding, that is entirely inconsistent with the amendments heretofore adopted declaring the difference in the cost of production to be the basis for fixing the rates by the President. I do not care to debate it, but I ask for the yeas and nays.

In supporting Senator Walsh, Senator Jones said:

Page 11227:

Mr. JONES of New Mexico. Then we have this situation presented as I see it: We can not directly ascertain the cost of production in this country or abroad, but through some sort of *legerdemain* we find out prices here and abroad, we find out the profits here and abroad, and we find out something else, and then we get at the cost of production. Is that the certain and fixed basis which the Senator from Wisconsin intended to establish as the one which must be used by the President in fixing rates? Did not the Senator from Wisconsin earnestly urge that the act would be unconstitutional unless we had a certain mathematical measure, unless it were made definite and certain? But the provision, as pointed out by the Senator from Montana, destroys the very certainty for which the Senator from Wisconsin pleaded.

Attorney General Sargent in an opinion rendered to the President, February 2nd, 1926, ruled that the expression in clause (4) subsection (c), "any other advantages or disadvantages in competition" permitted the use of "transportation costs to a common market."

Among other things he said:

"Subdivision (c) provides what factors shall be taken into consideration by the President in determining the differences in the foreign and domestic costs of production, and the proper rates of duty to equalize the same. It is therein provided that 'in ascertaining the differences in costs of production * * * the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in cost of production * * *.' If the Congress had intended that only the actual costs of production or fabrication at the places of production should be taken into consideration, it need have gone no further, but subdivision (c) continues by authorizing the President, in so far as he finds it practicable, to take into consideration, (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, etc.: and '(4) *any other advantages or disadvantages in competition.' If differences in transportation costs result in 'advantages or disadvantages in competition' the President is directed to take such differences in transportation cost into consideration, in so far as he finds it practicable to do so.*

The argument is advanced that clause (4) has reference only to clause (3), and is in fact but a continuation of clause (3), but this contention can not be sustained. 'When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.' (Porto Rico Ry. Co. v. Mor, 253 U. S., 345, 348, and cases cited.)

It is well settled that in construing a statute, the intent of the legislature is to be determined, if possible, from the language used in the act. (Moore v. United States, 249 U. S., 487, 489; United States v. Standard Brewery Co., 251 U. S., 210, 217.) And that this intention must be adduced from the entire statute and not from a part only. (United States v. Ninety-nine Diamonds, 139 F., 961, 963; Railway Commission v. C. B. & Q. R. Co., 257 U. S., 563, 589.) It is also equally well-established that a statute should be construed to give effect, if possible, to all of its parts; (Market Co. v. Hoffman, 101 U. S., 112, 115; United States v. Lexington Mills, etc., Co., 232 U. S., 399, 410; United States v. Standard Brewery Co., 251 U. S., 210, 218.)

* * * * * * * * * *

1. By Section 315 (a) the President is directed to investigate and ascertain the "differences in costs of production" of foreign and domestic articles, and to increase or decrease the statutory rates of duty, within the limitations fixed by the statute, to equalize such differences.

2. Section 315 (c) enumerates the factors which the President shall take into consideration in ascertaining such differences in costs of production, and in fixing the proper rate to equalize the same. In the performance of this statutory duty he should, by virtue of clause (4) subdivision (c), take into consideration, in so far as he finds it practicable from an analysis of the facts in each case, costs of transportation, whenever it is shown that such costs or differences therein, as between foreign and domestic articles, constitute an advantage or disadvantage in competition between the foreign and American producers.

Respectfully,

JOHN G. SARGENT,
Attorney General.

The PRESIDENT,
The White House."

The court below makes the fatal admission that the difference in cost of production at home and abroad cannot be precisely established, and further that a discretion is bestowed on the President as to HOW he shall find such cost differences.

At Rec. 93 the Court of Customs Appeals says:

> "The statements of many persons are cited, some of whom are past and present members of the United States Tariff Commission, to the effect that it is impossible to *precisely establish* the cost of production of an article. *This may be conceded.*" (Italics ours.)

They mean, of course, the *difference in cost of production at home and abroad.* That logically is an admission that the legislative choice between different results, involved in the legislative process of making a new rule for the future, is necessarily involved in the President's action.

The attempt to qualify the admission by the further statement that

> "It is likewise impossible to ascertain, aside from the realm of mathematics, with scientific accuracy, most of the things upon which our lives and human governments depend,"

does not avoid the fatal concession.

Most of the uncertain things upon which our lives and human governments depend cannot be committed to an executive to find as part of the legislative process. The Executive can only be commissioned to find facts and only such facts says Prof. Willoughby, as may be *precisely stated* by the legislature and *certainly ascertained* by the executive.

Willoughby on the Constitution, Vol. 2, page 1319, explaining the rule decided in Field v. Clark, says:

> "The doctrine thus declared is without objection so long as the facts which are to determine the ex-

ecutive acts are such as may be precisely stated by the legislature and certainly ascertained by the executive."

Again (R., 88), the Court of Customs Appeals, says:

> "It will be at once conceded, on a reading of Section 315 (C) that a very broad latitude is given to the President in making such findings of fact. The various factors named in the sub-section are to be used by him 'in so far as he finds it practicable.' A consideration of this language, taken with clause 4, 'any other advantages or disadvantages in competition' makes it manifest that the Congress intended to give to the President and to the Tariff Commission prosecuting the same inquiry discretion as to the means to be employed in ascertaining the fact."

And (R., 95) they say:

> "An analysis of Section 315 discloses that the President is not therein given any discretion as to what he shall do, but only as to how he shall do it."

These again are fatal admissions. For, as the choice of means is bound to affect the result, these statements admit the legislative discretion is exercised by the President in making his findings under Section 315.

POINT 6.

The Countervailing Duty cases Downs v. U. S., 187 U. S., 496, and Nicholas v. U. S., 249 U. S., 34, do not support the legality of Section 315.

No issue of delegating legislative power or taxing power was raised, in the countervailing duty cases. And, of course, no such issue was discussed in the Supreme Court's opinions therein.

In countervailing duty Congress itself provides that whenever any country gives a bounty, rebate or grant upon the exportation of merchandise dutiable under our tariff, an additional duty *"equal to the net amount of such bounty or grant"* shall be levied on such merchandise upon importation here.

For uniformity of departmental practice in the various ports of the United States the duty is imposed upon the Secretary of the Treasury to find out the amount of any such foreign bounties and declare them, and to make regulations for their assessment and collection.

In so doing the Secretary looks at the foreign law to find out if any such bounty has been given and the amount of it, as fixed by said foreign law.

If the foreign law gives it, it is there in the law, a simple existing fact, to be found when he searches for it.

In the Nicholas case the English law as quoted by the Supreme Court (249 U. S., 36), reads as follows:

> "It is provided that 'in consideration of the loss and hindrance caused by excise regulation in the distillation and rectification of spirits in the United Kingdom' there shall be paid 'to any distiller or proprietor of such spirits on the exportation thereof from a duty-free warehouse or on depositing the same in a customs warehouse * * * the allowance of two pence per gallon * * * and to any licenced rectifier who * * * has or shall have deposited in a customs warehouse spirits distilled and rectified in the United Kingdom the following allowances: * * * Three pence per gallon, and on spirits of the nature of spirits of wine an allowance of two pence per gallon. * * *' "

Thus the amount to be given or remitted on export is clearly stated, as it must always be, and thus constitutes a very simple fact to be always found, by the Secretary. There was no difficulty or contention about that. The sole

contention was, that considering what happened to those distillers who sold in England there was no advantage "bounty" or "grant" to those who exported.

But this Court said that the fact that a "grant," in perfectly definite amount, was actually given upon export was enough, and sustained the legality of the countervailing duty in the amount the foreign statute fixed for the export grant.

There were no complicated findings there, nothing comparable in any way to the operation of Section 315.

In Downs v. U. S., 187 U. S., 496, the same kind of question was raised. There was no difficulty in determining and no dispute about the amount which the Russian exporter received when he exported his sugar. This was clearly stated in General Appraiser Somerville's opinion for the Board of General Appraisers where the case arose when he said (T. D. 22984; G. A. 4912):

> "It is not denied by either party to this suit that if in fact any bounty or grant was bestowed the Secretary's finding as to the amount was correct."

The whole contention of the importer was that under the complicated paternalistic Russian system of controlling their sugar industry, the exporter, when he got his rebate, was no better off than if he had sold his sugar at home.

The Court held, page 514:

> "But the fact that he receives the same amount, whether the goods are exported or sold at home is not the proper test whether a bounty is paid upon exportation."

* * * * * * *

Page 516:

> "Therefore we hold that the Government of Russia does secure to the exporter of that country, as the

inevitable result of its action, a money reward or gratuity whenever he exports sugar from Russia."

Thus it clearly appears that there was no claim whatsoever of any uncertainty or difficulty about gathering, from the terms of the foreign statute, the amount of the grant or bounty given. And our opponents are in error when they claim that the Secretary made difficult or complicated findings of fact and weighed or compared competitive conditions in the trade of either country, in order to determine the amounts of said bounties.

We are at a loss to see how these two decisions of the Supreme Court as to what constituted a bounty or grant under the countervailing duty law, no question of delegating legislative power, or taxing power, being raised or discussed, can be considered supporting authority for the constitutionality of Section 315, as claimed by the Court of Customs Appeals.

POINT 7.

The appraisement cases so much relied on by our opponents and by the court below have no place in this discussion.

The action of the appraiser (or the Board of Reappraisement) in applying an ad valorem provision of a tariff act *to a particular importation* was final as to the amount of the foreign market value. Yet such appraisement of the value of a particular parcel of merchandise on the day of shipment could nevertheless be attacked on protest for an error of law committed, or because there was no evidence to support the conclusion reached, i. e., because it was a mere arbitrary fiat.

From this arose the Appraisement cases such as Auffmordt v. Hedden, 137 U. S., 310, Passavant v. U. S., 148 U. S., 214; Passavant v. U. S., 169 U. S., 16; Stairs v.

Peaslee, 59 U. S., 521 (18 Howard); Muser v. Magone, 155 U. S., 240, and similar cases, where it was threshed out how far such judicial review of the appraiser's action extended, and what relief could be given under it. These legal controversies have, of course, nothing whatever to do with the question of delegating legislative power or taxing power involved in the case at bar.

But our opponents, faced with the novel revolutionary character of Section 315, seek to becloud the issue and to transport this novel flexible process back to the time of the fathers, soon after the adoption of the Constitution, by claiming that the appraisement of a parcel of merchandise is analogous to, and therefore authority for, the President's action under Section 315. They then cite these appraisement cases as proof of such comparison.

Nothing could be more far fetched, yet because the court below adopted this contention and cited the Appraisement cases as authority for the legality of Section 315 we are compelled to discuss it. We cannot tell whether such false analogy will be claimed before this court. If it is, the answer is a simple one.

The distinction between executing or applying an existing ad valorem to a particular importation on the day of exportation, and making a *new* rate of taxation to apply in the future by changing an existing tariff rate, should be self evident to everybody. The mere statement of what the two processes are should be sufficient to show their complete difference.

However, having dragged the Appraisement cases into the discussion, much is then made of the fact that cost of production, in a single factory on one certain day, was sometimes used by the appraiser, when nothing else was available, to calculate a constructive market value therefrom, by adding certain fixed statutory minima for overhead and profit.

NOTE: This provision never permitted the Appraiser to look for such costs *outside of the shipper's own factory*

until the Act of 1922, of which act Section 315 forms a part.

All this is nothing to the point. It does not touch the issue in the case at bar. The two processes are totally different. They relate to entirely different things. They are used for entirely different purposes. The fact that some kind of cost calculations occasionally crept into finding ad valorem market value would not make the two processes similar in any respect. One still applies an existing rate and the other fixes a new tax rate for the future. The whole claim is an illogical non sequiter. The resort to it illustrates the weakness of the government's case.

Further after having thus forced the Appraisement cases into the discussion, our opponents (and the court below) announce that as the finding of market value by the Appraiser was held by this court not to be unconstitutional for lack of "due process", that somehow mysteriously supports the government's contention here. They seem to foreget that our claim of unconstitutionality in Section 315 is not for lack of "due process" of law but because Section 315 illegally attempts to delegate to the Executive legislative power and taxing power.

At the oral argument of U. S. ex rel. Norwegian Nitrogen Products, Inc. v. U. S. Tariff Commission, March 3, and 4, 1927 (274 U. S. 106, advance sheets), Judge Devries, asserted that the process of operating Section 315 was similar to appraising a parcel of merchandise. The following occurred:

> "Justice Van Devanter: How is it exactly the same? That is only a question here as to the rule that is to be applied—the law; while in case of the appraisement, the rule is the same, the law continues the same, it is a mere ascertainment of whether or not the particular importation is in point of fact within one rule or within another. But here, as I gather from what has been said, the rule is to be applied—

the law is the change and therefore the one was in force as to the matter of applying rates of duty while the other is the matter of making the rule or altering the existing rule to be applied.

"Mr. DeVries: I think your Honor will find on reflection these cases are identical, with this difference, that the finding of the appraiser determines the duty to be laid in the individual case while the finding of the President, assisted by the Tariff Commission, is the determination by the ascertainment of the state of facts—the same state of facts—as to the cost of production which shall be applied to a number of importations.

"Justice McReynolds: The difference between the trying of the case and the making of a law?

"Mr. DeVries: No, each is delegated a power to find the same state of facts which shall determine the question of duty to be laid in the one case upon one importation, in the other case upon a series of importations." (See Certificate of Public Stenographic Reporter, Appendix "P", p. 155.)

This completely eliminates the Appraisement cases from this controversy. Yet in the brief below (p. 41) the Government's counsel made this remarkable assertion:

> "It is respectfully submitted that if Section 315 is unconstitutional all ad valorem duties levied since the foundation of the Government were in violation of the Constitution."

That unfounded and extravagant claim will doubtless not be repeated before this court, although in the Government's brief opposing our motion for a writ of certiorari pages 12 and 13 the Appraisement cases were cited and relied on.

POINT 8.

A non justiciable subject matter such as this cannot be made into a judicial process nor can the ultimate duty be laid upon the courts, by review of this machinery, to take part in fixing the tax rate. Consequently the Interstate Commerce Commission cases which deal with a justiciable subject matter are not in point and are not legal authority for the legality of a flexible tariff.

All through the case below the Government in brief and argument (as well as the opinions of the courts below), have attempted to associate this flexible tariff process with a litigation, and to deal with it as such, in order to claim as authority for their position, the cases dealing with the Interstate Commerce Commission's fixing of rates for a carriers' public services.

Enforcing the right to a reasonable charge for a public service, was a litigable matter at common law, and when transferred to commissions the action taken must always be subject to judicial review for arbitrary and confiscatory action. That is a totally different process from fixing the future tax rate by changing the law necessarily without judicial review of the action taken.

No understanding of the work of the Tariff Commission is possible if one starts with the erroneous notion that an investigation by the Tariff Commission is in the nature of a litigation and therefor similar to the assertion of the *right* to pay or collect a "reasonable" charge for a public service.

In all litigation, whatever the particular form or purpose, the leading idea is that of a legal person, claiming to be vested with a specific right coming before a tribunal to show that some other person has infringed, or is about to infringe, that right. Litigation involves the concept of actor and reus, and of a right infringed or a duty

broken. But an investigation by the Tariff Commission under Section 315 is not for the purpose of ascertaining whether somebody's right under the law has been infringed. It is for the purpose of ascertaining whether a change in the law shall be recommended to the President by the Commission.

There is nothing analogous to a judgment or decree or even to an order of the Interstate Commerce Commission, which order declares a rate in conformity with the shipper's right to pay, and the carrier's right to demand, a "reasonable" charge for the public service rendered or protects against "unjust" discrimination, etc.

An application for a change in a tariff rate is valuable not so much for what it alleges as what it suggests. It is wholly unlike a pleading. The Tariff Commission rightly does not examine an application for the purpose of determining whether or not it states sufficient grounds for instituting an investigation, and then act in accordance with that determination. On the contrary, the Commission correctly treats every application merely as a suggestion drawing its attention to the possibility that in respect to the article mentioned, the differences in foreign and domestic production costs, advantages and disadvantages, etc., may not be equalized by the existing duty.

Before an investigation is instituted the Commission rightly pursues a preliminary (and independent) inquiry of its own for the purpose of ascertaining whether a formal investigation should be undertaken. The subject matter is the supposed difference between costs of production in the United States, and supposed costs of production in the principal competing country as modified by "any other advantages and disadvantages in competition."

It may appear that there is only one domestic producer and only one producer in the foreign country. That would be accidental. Ordinarily American producers may number hundreds or even thousands and so may the foreign. Out of a multitude of such producers the applicant may

be the only one agitating for a change in duty. Yet the costs (and advantages and disadvantages) of the non-petitioning producers are all to be taken into account, just as much as those of the petitioner.

The "investigation" means precisely what the word imports. The hearing is but an incident of the investigation and by no means its controlling feature. The hearing is held after much of the investigation has been done, in order that nothing may be overlooked or omitted. The hearing is not for the purpose of trying out a legal contest between interested parties, whether producers, importers or consumers, but for the purpose of informing the Commission and enabling it the better to report to the President. Since nobody has a legal right to the continuance of any customs duty, the hearing provision involves no question of due process.

After all it is upon the President, and not the Tariff Commission whose action is merely advisory, that Congress has attempted to confer the entire power to alter the customs duties established by the statute.

There is no provision in Section 315 for judicial review of the President's findings when he proclaims a new tariff rate. There could not be. No one can plausibly claim that the courts either directly, or indirectly through review of the acts of a Commission or a President, can be made to take part in fixing the tax rate.

In the Sugar and Linseed oil investigations the Tariff Commission made findings which the President ignored. In so doing he was entirely within his rights and within his prescribed duty. In the Wheat investigation the President proclaimed a rate suggested by three of the Commission ignoring the recommendation of the other three.

It is impossible for the legal mind to contemplate a judicial proceeding to review what the President has full authority to determine under this Section or to decide between his judgment and that of the Tariff Commission, or to go into the question whether there was legal evidence (or any evidence at all) to support his findings.

The hearing provided for does not make a record before the President, who alone acts, for subsequent judicial review. The whole thing is an "investigation" pure and simple. There are no parties in the legal sense; there could not be. No one has a legal right to the retention or to the imposition of a particular tariff rate. The information upon which the President acts can be obtained anywhere or even by private conversation with any one supposed to know.

This fully demonstrates the complete inapplicability to this controversy of the Interstate Commerce Commission cases and State Commission cases; which filled the opinions of the courts below.

They deal with a subject matter—rates for public services—which always has been and still remains a justifiable subject matter through the quasi-judicial functions of the Interstate Commerce Commission, plus the court review of their action, still existing.

In Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S., 426, Chief Justice White says:

> "Without going into detail, it may not be doubted that, at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that, when a carrier accepted goods, without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted, either in advance or at the completion of the service, an action may be maintained to recover the overcharge."

A tax is not a toll: "A tax is a demand of sovereignty, a toll is a demand of proprietorship."

Reading R. R. Co. v. Pa., 15 Wallace, 232, 278.

In Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S., page 92, this court said:

> "Under the statute the carrier retains the primary right to make rates, but if, after hearing they are shown to be unreasonable the Commission may set them aside and require the substitution of just for unjust charges."

Further pointing out the judicial review which may be had for arbitrary or confiscatory action by the Interstate Commerce Commission.

Note the Supreme Court's expression "just or unjust charges." There is no such *legal* concept as a just or unjust tariff rate. It cannot be too often repeated that the power to tax is the power to destroy.

POINT 9.

The currency cases do not support the Government position. Cramer v. Arthur, 102 U. S., 612; Arthur v. Richards, 90 U. S., 259; Hadden v. Merritt, 115 U. S., 25; U. S. v. Klingenberg, 153 U. S., 93.

The Congress has a right to place any value for customs purposes it pleases on foreign money. This it did for a long time; arbitrarily declaring in the statute itself that for customs liquidations the British Pound should be worth so much in American money, the French Franc so much, the Austrian Florin so much, and so with other foreign moneys. Later it authorized the Secretary of the

Treasury to proclaim such value for a year and later still from quarter to quarter, thus coming nearer the true value, and being a fairer way of doing it. It was plain that Congress could not pass such a currency valuation statute every quarter. Many months Congress is not even in session.

To thus relax the arbitrary rule and make it less arbitrary was not delegating legislative power or taxing power.

The Secretary either (1) measured the number of grains of gold and silver in a foreign coin—the simplest and most easily ascertainable thing imaginable.

Or (2) if exchange values were to be considered, asked the nearest bank what the rate of exchange with a country having a depreciated currency was on a particular certain day—an equally certain and definite process.

Indeed the present act goes a step further and provides for the customs settlement on the quoted Federal Reserve exchange rate.

It is no wonder that no counsel in the currency cases cited by the Government had the temerity to claim that the question of delegating legislative power or taxing power was involved.

POINT 10.

The Chemical Foundation case is not in point.

United States v. Chemical Foundation (272 U. S., 1), cited by the Government, is not in point. The statute construed was a war measure, to protect the whole people of the country. The Government took absolute control of enemy property, the Alien Custodian acting as trustee. The Government had the right, under the rules of war, to deal with enemy property as if it was its own. Provision was made, however, for certain public sales, unless the President thought otherwise.

This court clearly distinguished the power to the President to provide for private sales, when necessary for the prosecution of the war, from a delegation of legislative power.

Mr. Justice Butler said, for the court:

> "The determination of the terms of sales of enemy properties in the light of facts and conditions from time to time arising in the progress of the war was not the making of a law; it was the application of the general rule laid down by the act. When the plenary power of Congress and the general rule so established are regarded, it is manifest that a limitation upon the excepted class is not a delegation of legislative power."

In other words, enemy property being confiscated *for the purpose of fighting the war,* a limitation for private sale when the President thought that would better prosecute the war, from the class to be otherwise sold at public sale, was plainly nothing similar to delegating legislative power.

The court further said that the Act went

> "as far as was reasonably *practicable* under the circumstances * * *."

And that the Act

> "is a war measure covering specifically, fully and exclusively the seizure and disposition of enemy properties." (Italics ours.)

Contrast that with delegating to the President power to fix the future tax rate under an alleged standard which is no standard, a supposed policy which is indefinite, uncertain and shadowy, under a formula without form, such as Section 315.

ALTERNATIVE POINT.

If our contention that Section 315 attempts to make an illegal delegation of legislative power and taxing power is overruled, then another question of first impression and far-reaching consequences must be decided, namely, whether a levy frankly stated to be for the purpose of protection, irrespective of revenue, is legal.

If this court should for any reason feel compelled to hold that Section 315 is a legal delegation of taxing power to the executive; notwithstanding the fact that all the economists, who have studied it, declare, and all those who operate it admit, it to be an arbitrary, discretionary, guess-work process (see appendix) then, and only then, another vital question of first impression, never before litigated or possible to be litigated, must be decided.

As the dissenting trial Judge said (p. 66):

> "Moreover, the plant before us is beyond the power of Congress even if it is not held to be an illegal delegation of legislative power. For it purports upon its face to make a levy for a private purpose.
>
> "It cannot be denied that a tariff based upon differences in foreign and domestic production costs executes a frankly declared protective policy. Let this phase of the issue be clearly stated. It is whether the levy itself, laid ostensibly for what we call 'protection', and frankly not for the purpose of raising revenue, falls within the definition of the term 'tax', levied to pay the debts and provide for the common defense and general welfare of the United States, for which alone authority is given to Congress.
>
> "The question is whether a levy can be made, not ostensibly for revenue, thus placing the motive of

Congress beyond judicial inquiry, but frankly, and on the face of the statute, for a trade advantage to particular citizens (any revenue raised therefrom being merely incidental or accidental) and still be called a tax laid for the 'common defense and general welfare.'

"The rate of 4 cents per pound upon barium dioxide, fixed by the Congress itself in the Act of 1922, is laid in the familiar form used for the purpose of raising revenue (whatever its incidental effect) since the formation of our present Federal Government. The legality of that rate so levied cannot be contested. To permit the courts to take proof of its effect, and inquire into the motives of the Congress in levying a duty in that form, would upset the Government and transfer powers over legislation and over taxation to the judicial branch. The additional 2 cents per pound, however, is expressly stated, by the Congress in Section 315, as well as by the executive proclamation fixing its amount, and directing its levy; to be levied for the sole purpose of equalizing production costs at home and abroad."

Further, at pages 68, 69, 70, the dissenting trial judge said:

"In South Carolina v. United States, 199 U. S., 437, Mr. Justice Brewer, speaking for the majority of the court, says, at page 450:

By this clause (the tax clause) the grant is limited in two ways: The revenue must be collected for public purposes and all duties, imposts and excises must be uniform.

"In the case of United States v. Boyer, 85 Fed., 425, at page 432, Rogers, District Judge, says that the words 'and provide for the common defense and general welfare of the United States' according to the

most liberal constructionist, is a limitation on the taxing power of the United States, and that only.

"In the case of Loan Association v. Topeka, 20 Wallace, 655, Mr. Justice Miller says on page 664:

We have established, we think beyond cavil, that there can be no lawful tax which is not laid for a *public purpose.*

"For conclusive arguments demonstrating that the words 'general welfare' as used in the tax clause grant no power whatsoever to the Congress see (1) statement of George Nicholas, in answer to Patrick Henry, in the Virginia Ratification Convention, 2 Elliott's Debates, 244, 245; (2) Paul Leicester Ford's 'Jefferson', vol. eleven, page 489; (3) the 41st number of the Federalist, written by James Madison, and (4) speech of Henry St. George Tucker, in the House of Representatives, March 3, 1926.

"No court has ever declared this reference to the general welfare' to be a grant of power. None ever will. Certainly, no court will ever say that it grants power to delegate a trust committed by the people to Congress alone.

"Again, a prohibited tax levy or delegation cannot become legal by calling it a regulation of commerce as this Section 315 purports to do.

"If that were so all express and implied limitations upon the power of taxation would be done away, if the particular act affected commerce, as most taxation does, and it was merely called a regulation of commerce. These provisions of Section 315 must stand or fall for what they are upon their face, namely, a levy frankly for protection and the attempted delegation of the power to tax, and not by what they are called. (See Child Labor Tax Case, 259 U. S., 20; Hill v. Wallace, 259 U. S., 44, and Trusler v. Crooks, decided by the Supreme Court, January 11,

1926.) If illegal, as a tax, or as a delegation, the fact that they affect commerce will not save them. * * *

"Neither the doctrine of implied powers, nor the power given to Congress in Sub-section 18 of Section 8 of Art. I, to pass all 'necessary and proper' laws to carry out the powers expressly granted, gives any support to the Government position. Power to delegate to executive discretion the levy of a tax upon the citizen can never be implied from the grant of such a trust to Congress alone. Nor could such delegation ever be 'necessary and proper' as a means of carrying out a trust exclusively committed to Congress. Nor, if there was no delegation of legislative power involved, can a levy, upon the face of the statute for protection alone be a tax for the 'general welfare'."

Opponents fail to see that the section *on its face* (cost of production formula frankly declared) and by the President's proclamation raising the rate here from the statutory rate of 4 cents, by 2 cents additional, per pound, are for the sole purpose of giving protection to a favored class. For they argue (as does the United States Court of Customs Appeals) that Congress has been passing, for years, high tariff statutes for the purpose of protection. Admitting that premise, for the sake of argument only, *we say that no previous tariff act on its face, which avowed its purpose, was for protection.* If it had, it was open to challenge; and that is the reason it has not been challenged. *But here, for the first time, Congress has openly and avowedly declared it in the statute on its face, and, therefore, it can now be properly challenged, and is challenged, on this additional ground.* This Court has held statutes unconstitutional, which, on their face, showed they were not for taxation, but for some other purposes

(Bailey v. Drexel Furniture Co., 259 U. S., 20; Hill v. Wallace, 259 U. S., 44). It is admitted in the opinion of the Court of Customs Appeals (R., 97), that this section plainly *is an effort to afford protection to certain industries of the United States.* The 2 cents additional is not for purpose of revenue.

Loan Association v. Topeka, 20 Wall., 655. We quote (p. 660):

> "With these remarks and with the reference to the authorities which support them, we assume that unless the legislature of Kansas has the right to authorize the countries and towns in that state to *levy taxes to be used in aid of manufacturing enterprises, conducted by individuals, or private corporations, for purposes of gain, the law is void, and the bonds issued under it are also void.*"

Page 662:

> "It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism."

Page 663:

> "The theory of our governments, State and National is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

> There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Pages 663-4:

> "* * * A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent, imposed by the United States on the circulation of all other banks than the National banks, drove out of existence every State bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, *if there is no implied limitation of the ends for which the power may be exercised.*" (Italics interpolated.)

It has been urged that the words "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," are sufficient excuse for this delegation. But "proper" means proper within the definite constitutional restrictions, for constitutions are made to restrain governments.

In 41st Federalist, appears a paper of Mr. Madison on this subject, in which he distinctly denies that the words "all laws necessary," etc., are to have a comprehensive meaning, but says that they have a restricted meaning, and shows that the words "general welfare" are not a grant of power.

As a delegation of legislative-power and taxing-power is prohibited by the provisions limiting such power to

Congress, a right to delegate such power to the Executive, cannot be implied. Such implication would destroy the prohibition, the implication would have nothing to rest on. There is no such doctrine of implied powers.

The court below makes a labored and ineffectual attempt to show that section 315 is merely part of a general revenue law with incidental protection, whereas Section 315 is in fact and law a separate independent provision differing in every particular from the fixed rates of the dutiable section of the act. They then fall back upon the commerce clause in an attempt to justify the legality of the protective formula stated on the face of Section 315.

THE COMMERCE CLAUSE GIVES NO SANCTION WHATSOEVER FOR SECTION 315.

The Government's claim, under the commerce clause, that this tax is a regulation of commerce, does not change its nature, nor screen and protect this plan, nor turn it from an illegal delegation into a valid enactment. The words in the section, under the guise of commerce, are merely a *subterfuge to cover* an illegal delegation of the taxing-power.

A tax regulating commerce is still a tax and subject to all the limitations governing taxation; including the "prohibition" against delegation. It is still (unlike commerce rate regulation) the power to destroy. No court can declare it unreasonable or confiscatory. The President cannot regulate commerce. Again, "a regulation of commerce" is a polite name to give a purely protective levy. If bad as the latter, such designation, even if true, will not save it. Otherwise, for every tax affecting commerce and so named, the limitations preventing delegation and preventing a levy for private purposes, are completely destroyed—*reducio ad absurdum.*

Had there been no tax clause in the Constitution could

Section 315 have been enacted under the power to regulate commerce? But even if Congress can tax under the commerce clause alone it can not make a levy for a private purpose. A tax to equalize foreign and domestic cost differences is not in any rational sense of the word a regulation of commerce. Commerce cannot be regulated for a frankly declared private purpose.

The President cannot be delegated the authority to levy taxes for the regulation of commerce any more than he can be delegated authority to levy taxes for the raising of revenue. It is plain therefore that Section 315 as a delegation to the executive gets no sanction from the "commerce clause".

On the other hand, assuming, for the purpose of the argument only, that the Section is a legal delegation, the commerce clause gives it no support or sanction as being on its face for the private purpose of "protection" to certain purely domestic industries. Otherwise the "commerce clause" could be invoked as authority for a direct subsidy out of the public treasury paid to domestic manufacturers to make up "cost differences". Such a duty levied to meet "cost differences" no more affects commerce than such a direct subsidy paid to make up such differences.

The levy of a tax on its face for "protection" under the commerce clause (if taxes can be levied under that clause) is outside the rightful powers of government just as much as if it were levied under the tax clause.

We are dealing here with a *limitation* on the powers of Congress not to delegate to the executive the power of legislation or the power of taxation. This *limitation* is not to be destroyed by an implication expanding the powers which it expressely *limits*.

In Fairbank v. U. S., 181 U. S., 283, this court said:

> "If powers granted are to be taken as broadly granted and as carrying with them authority to pass

those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress *that prohibition or limitation should be enforced in its spirit and to its entirety.* It would be a strange rule of construction that language granting powers is to be liberally construed and that *language of restriction is to be narrowly and technically construed.* Especially is this true when in respect to grants of powers there is as heretofore noticed the help found in the last clause of the eighth section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretations in both directions is to give full liberal construction to the language, aiming ever to show fidelity to the spirit and purpose." (Italics ours.)

The spirit and purpose of the limitation here is plain; namely, that Congress alone, and no executive, should exercise the legislative and taxing discretion.

> "The power to regulate commerce has no limitations, other than those prescribed in the constitution, but does not carry with it the right to *destroy or impair those limitations and guarantees which are also placed in the constitution* or any of its amendments." (Italics ours.) (U. S. v. Joint Traffic Association, 171 U. S., 505, 571).

So it was held in Monongahela Navigation Co. v. U. S., 148 U. S., 312-336, that if under the power of regulating commerce Congress takes property it must pay just com-

pensation. And in I. C. C. v. Brimson, 154 U. S., 447-449, it was held the constitutional security protecting private books and papers could not be invaded under the guise of regulating commerce.

It therefore conclusively follows that even if Congress can tax under the Commerce clause, such tax must still be laid by Congress itself, without delegation to executive authority, and such tax must still be levied for the "general welfare," and not for a private purpose plainly expressed upon the face of the statute. In other words, the constitutional limitations on taxation still remain.

CONCLUSION.

This is a momentous question; with grave possibilities. It touches root and branch, the constitutional tree, planted and raised, in restricted soil, by the sovereign people. If this can be done, then all kinds of taxation can be fixed by the Federal Executive; thus doing away with checks and balances; thus merging the legislative and the Executive; thus leading to the establishment of a government of men and not of laws, of which posterity will be the legatee.

Such a scheme is not within the intendment of the framers of the Constitution.

How abhorrent the tax-gatherer was, both in this country and England, prior to the Revolution, needs no exposition. Taxation was one of the causes, if not the principal cause, of that conflict. The Colonies and the States could, at will, change their system of taxation. But lodging it in a general government was quite a different thing. Therefore, can it be supposed, noting with what reluctance the States surrendered the power to tax imports, that in lodging and restricting that power, in a Federal Legislature, it was intended that the Executive should have power of and over this taxation; or any other kind?

Our sworn representatives in Congress, have violated our trust, which was given to their stewardship. Fortunately, by our written Constitution, we can turn, in order to preserve the integrity of our political heritage and pass it on unimpaired to our posterity, to our Supreme Court, to act as a bulwark against subversion of our Constitution and our liberty preserved and guaranteed thereby.

Section 315 is economically unsound. It reflects no social urge. It does not take the tariff out of politics. A purely political question like the tariff question can never be taken out of politics.

It attacks at a vital point and practically destroys the underlying principle of our Constitutional system concerning the separation of governmental powers established for the protection of liberty and property. We submit that it is clearly unconstitutional.

Respectfully submitted, as in duty, etc.,

WALTER EVANS HAMPTON,
Counsel for J. W. Hampton, Jr. & Co.

New York, N. Y., January 26, 1928.

APPENDIX A.

Thomas Walker Page, sometime Chairman of the Tariff Commission, in his book entitled "Making the Tariff in the United States" (Chapter IV, pp. 83-99), says:

> *"The application of the difference between costs as a measure of duties is usually impossible owing to the difficulty of finding what the difference amounts to.* There is much misunderstanding as to what cost accounting can really show. It is true that no manager of any considerable and well-conducted business today fails to record the costs of the business and to make some analysis of them. He finds it desirable to do so in order to stop leaks, to promote efficiency, to exhibit the net profits of the enterprise, and for other purposes. There is a popular assumption that the records thus kept will accurately disclose the cost per unit of the products turned out. In fact, however, this is seldom the case.
>
> "A multitude of questions arise in regard to the items which should be allowed as component elements of cost, and to these the answers are different in different plants and also for different purposes. Shall the owner's salary, for instance, be considered a part of the cost of production; and if so shall he be allowed a salary at an arbitrary rate or shall the particular amount be allowed which he sees fit to claim? Shall the materials used be valued at their market price, or at what it actually cost to procure them? Shall interest be allowed on the value of plant and equipment; and if so is it proper to take the value of the plant as a 'going concern,' or is it better to take as the value for estimating cost the outlay of the owners in acquiring and improving it? Such questions suggest that cost can be made to seem either high or

low by the system of accounting which is followed. It might be possible in time to standardize the system and thus in a somewhat arbitrary way to reach a cost per unit of product in some industries that consist of simple and independent processes resulting in a single product. But such industries are relatively few. Modern industrial processes are commonly so organized and integrated that they contribute jointly to the completion of a number of different commodities. The accountant is usually faced, therefore, with the problem of joint costs, and the solutions accepted are *purely arbitrary* and differ widely from one plant to another.

"Even in a simple pastoral industry, such as sheep husbandry, this problem is encountered. It may be noted in passing that this industry also presents a number of other problems, which arise in determining what are to be accepted as elements of costs. Should rent on the land used and interest on the total investment be regarded as items of cost, and, if so, at what rate? On the other hand, should account be taken of certain indirect but valuable considerations, such as the destruction of weeds or the improvement of the soil; and if so, how can their value be appraised? But aside from any question as to how the total cost is constituted, what is the *basis* on which it can be divided between the wool and the meat produced? The existing tariff law imposes duties at different rates on sheep, on mutton, on lamb, and on several varieties of wool. If these duties are to be measured by the difference between domestic and foreign costs, the total costs of sheep husbandry must in some way be distributed amongst the different products on which the duties are levied.

"The basis of distribution adopted by the Tariff Commission is doubtless as good as any. Thus the Commission reported that Montana during 1919 the

expenses for 82,122 sheep were $9.93 a head. This was made up of labor, interest at 6 per cent on investment, feed, fees and rentals, shearing, depreciation and miscellaneous. It is clear that no important item except shearing was incurred exclusively for a single product. Expenditures for labor, feed, and the rest were made for producing both meat and wool. The Commission divided the joint costs between these two products in proportion to the sheep owners' receipts from each of them. In that year it happened that 61 per cent of the total receipts in Montana came from wool and 39 per cent from mutton and lambs. As the average amount of wool sheared was slightly over eight pounds per head, this method of division showed the cost of wool in Montana to be more than 76 cents a pound. In the other range states it varied that year between 32 cents in Texas and about 49 cents in Idaho.

The fallacy of the method is obvious, since it makes it appear that the smaller the receipts from either product the lower will its cost be. *This is clearly contrary to fact.* Thus a hard winter, with feed scarce and dear, followed by bad weather during the lambing season, compels the flock owner to make unusual outlays to save any lambs at all. In spite of his efforts the lamb crop is apt to be poor and the lambs stunted and unable to make satisfactory development, so that his receipts from them are small. Under such circumstances the commission's system of accounting would show that the cost of the lambs was exceptionally low and that of wool proportionately high; and by a pernicious paradox if the lamb crop were a total failure, the lambs would have cost nothing at all! Conversely, conditions favorable to a good lamb crop would appear to raise the cost of lambs and thereby lower the cost of wool. It should be noted, however, that receipts vary not only with

conditions of production but also with changes in the market, and the price received for lambs is determined by causes quite remote from those that determine the price of wool. Thus a rise for any reason in the price of wool would appear, regardless of the actual outlays incurred, to lower the cost of growing lambs.

"And yet, defective as the Tariff Commission's method of allocating costs may be, there is none that is better. *The truth is that there is no separate cost of producing wool.* There is a cost of growing sheep and for a defined locality year by year it may be found and recorded, but any distribution of the cost among the products of the business is altogether arbitrary. To the sheep owner this is a matter of little moment. He is not much concerned with how much of the cost is to be allocated to wool and how much to lambs. *But to the tariff maker it is a matter of vital importance* if he is to put one duty on sheep and other duties on wool, mutton, and lamb, and if he must measure the duties by the difference between the domestic and foreign cost of producing these several things.

"The difficulty found in trying to establish the cost of producing wool is much greater when it comes to finding the cost of commodities, such as cattle hides, which are the by-product rather than the joint product of an industry. Agriculture presents many similar instances. *How can the cost of raising cotton seed,* for example, on which there is a duty of one-third of a cent a pound, *be segregated from the cost of raising cotton,* on which there is no duty at all? Flaxseed in some countries is a by-product of growing flax; in some countries flax is cultivated for the seed alone. *How is a comparison of costs to be made in such a case?* Straw is a relatively unimportant by-product of wheat, oats, barley, or rye. *On what theory can an independent cost be assigned to it?* Some varie-

ties of hay are grown chiefly as a cover crop, others for their effect on the soil, and there is *no reasonable hypothesis* on which a *specific cost of production can be imputed to them.* Yet all these things are now dutiable.

"In many branches of manufacturing the problem of joint costs is even more confusing than in agriculture. In its study of the dye industry in 1919 the Tariff Commission found that different producers used five separate bases for distributing expenses, namely, the amount of labor directly used on a given product, the cost of the raw material going into it, the amount of superintendence chargeable to it, the sales value of the product, and the capital investment imputed to it. Naturally the costs showed great diversity, and the commission on presenting its report found it necessary to 'strongly emphasize the uncertainty of conclusions drawn from the cost figures in this report, and the possibility of error in administrative action based upon such data. * * * The figures are, however, the most trustworthy and the most significant that can be immediately procured under present conditions in the industry, and in any discussion of the cost of production the tables must be accepted as the nearest approach to accuracy now possible.' It is true that the dye industry furnishes an extreme illustration of the difficulties involved in cost finding. But after all it is only a question of degree, and *the Tariff Commission's frank statement might well be extended to every industry resulting in a variety of products. 'The nearest approach to accuracy possible' must always leave room for 'uncertainty of conclusions drawn from the cost figures and the possibility of error in administrative action based on such data.'* Obviously, the uncertainty of cost data severely contracts the field in which the difference between foreign and domestic costs can be used to measure duties.

"Even if cost data were reliable the fact would remain that there is in every country more than one cost at which any commodity is produced in commercial quantities. From this it follows that there is no such thing as a single domestic cost or a single foreign cost of production for any commodity. A report of the Federal Trade Commission in 1920 showed that in Oklahoma and Texas the cost of preparing a three-year-old steer for market varied on different ranches between $68.20 and $101.67. Even before the war the cost of making beet sugar in the United States differed at the factories all the way from $66.40 to $139.80 a ton. The cost per pound of growing wool (including interest on the investment) as estimated by the Tariff Commission for the range states in 1919 was 32 cents in Texas, 41 in California, 43 in Colorado, 49 in Idaho, 76 in Montana, 36 in Utah, 35 in Washington, and 48 in Wyoming.

"The process of manufacturing the pigment known as lithophone is comparatively simple. In 1919 it was carried on in the United States by eleven companies, who, taken together, produced 145,000,000 pounds. Their methods of accounting were detailed and fairly comparable though there was lack of uniformity in treating individual items, and the Tariff Commission found little difficulty in ascertaining costs for each company in the industry. One company was producing lithophone at 5.29 cents a pound. From this figure the cost rose quite gradually for other companies to a high point of 7.51 cents a pound. A subsequent investigation two years later showed costs ranging between 5.58 and 7.73 cents a pound, a variation equal to 38 per cent of the low cost. In more complicated and widely distributed industries costs when found usually show a far greater variation.

"Causes for this variation are numerous. It often happens that the same product is obtained from materials so widely different that the processes of manipu-

lating them are utterly unlike. Thus potash in 1919 was obtained in the United States from natural brines, molasses, silicate rocks, kelp, wood ashes, the dust of cement mills, and other sources. Sometimes different methods are applied to the same materials. Ferromanganese, for example, made in blast furnaces in the United States was estimated to have an average cost of $159.67 a ton in 1919. It was being made at the same time in electric furnaces at an estimated average cost of $218.94 a ton. Similar differences were observed in the case of other ferro alloys.

"Very often costs vary because of unequal climatic conditions, qualities of soil, advantages of location, or availability of fuel or water power. Quite obviously they are strongly affected by the efficiency of management, which differs widely from plant to plant. Sometimes also the variation is caused by what appears to be a mere element of chance. Two cloth manufacturers, for example, may be equally well situated and equally efficient, using the same materials and practically the same processes so that their products show no appreciable difference in texture or quality. Yet the fabrics turned out by one of them happen to please the public fancy by reason of some peculiarity of color or design, and the mill producing them runs throughout the season at full capacity. The fabrics of the other fail to meet the whim of prevailing fashion; orders for them are small and the mill's output is correspondingly reduced. At the end of the season the costs per mill might approach equality, but the cost per yard of these similar fabrics would show a wide divergence. In 1918 the western half of the cotton belt was visited by a severe drought which so damaged the crop that on many plantations the actual cost of the cotton picked was more than $1.00 a pound. In the Eastern States, on the contrary, the season was favorable, and the cost of much

of the cotton picked was less than 20 cents a pound. *These illustrations suffice to show that variation in costs of production is general, that it can not be compensated by any method of bookkeeping, and that it can not be prevented by any device of human ingenuity*

"There is, in fact, no such thing as a single 'domestic cost of production' for any commodity. There are almost as many different costs as there are producers; and the question arises: which should be taken for comparison with a foreign cost to find a standard for measuring duties? It is obvious that the higher the figure taken the greater will be the proportion of the industry protected. But no one would advocate duties high enough to protect producers whose high costs are due to unwise location, inadequate equipment, extravagant methods, or poor management. On the other hand, if the lowest cost be taken it might well result in no duty at all, for the lowest domestic costs are sometimes less than are the lowest costs abroad.

"Perhaps the advocates of this method of tariff making most commonly have in mind a comparison of the *average* domestic cost with the *average* foreign cost. Now the average might mean either the average cost per unit of the commodity under consideration, or the average cost in the different plants producing it, or the cost that is just midway between the highest and the lowest in the industry. *These three figures would never coincide except by accident, and none of them would precisely meet the purpose in mind.* Consider by way of illustration the operation of averages in the industries already mentioned: The Tariff Commission estimated the average cost per pound of producing raw wool in the range states in 1919 to be 45 cents. A representative of the commission who visited Argentina estimated the average cost in that

country at the same time to be 27⅓ cents. The difference then was 17⅔ cents. But a duty at this rate on unscoured wool would be 12 cents a pound higher than was shown to be needed in Texas, and higher than was necessary in five other range states, while it would fall short by 50 cents a pound of protecting sheep raisers in Montana and by less amounts in Arizona, Idaho, and Wyoming.

"For lithophone the Tariff Commission gave the average cost not by pounds produced but by companies producing it. This average during the first six months of 1921 was 6¼ cents. For half the number of producers the cost was less than this and for half it was more. There is nothing to show what part of the total output was produced above or below the average cost of the different companies. But whatever the average cost per pound may have been, it is clear that a duty based on the average cost of the separate producers would have given unnecessary protection to some of them and would have left others unequally exposed to foreign competition.

"Again, the domestic beet-sugar factories of the United States in 1918 showed an average cost of $130.61 per ton. But the factories producing at a lower cost than this had a greater output than those where the cost was higher, so that the average cost of the beet sugar they all produced was only $109.96 a ton. In that year the average cost by tonnage in Cuba was $78.72. A duty then of $31.24 a ton—or say, roughly, $1.57 cents a pound—would have equalized the difference in costs for half the beet sugar produced in the United States, but for substantially less than half the producers. Now it happens that the highest costs are found in the eastern region of production, that is, Michigan, Ohio, Wisconsin, Indiana, Illinois, Minnesota, and Iowa. A duty, therefore, high enough to protect only the

average would have more sufficed for the mountain states, would have more than sufficed for the Pacific Coast, but would probably have put out of business most of the eastern beet-sugar factories as well as the cane growers of Louisiana.

"It is hardly to be expected then that a committee of Congress framing a protective tariff will accept as 'the difference between foreign and domestic costs' a mere difference of averages and base upon it duties that it believes would fail to protect wool growers in such important centers of the industry as Montana and Wyoming or beet-sugar producers in a region of such great political power as Michigan, Ohio, and the adjoining states.

"It is well to remember, furthermore, that in most industries costs vary from time to time as widely as they vary from plant to plant. Wool, for example, which was estimated to cost 76 cents a pound to produce in Montana in 1919 had been produced for less than 44 cents in that state the year before. *To establish a reasonable average cost, therefore, would require an investigation of protected industries, not for one year only but for a number of years. This would render the proposed method of tariff making impossible until after the lapse of at least half a decade and the expenditure of many millions of dollars.*

"The difficulties of obtaining and verifying costs of production are infinitely greater in foreign countries than they are in the United States. Any investigation of foreign costs would not only encounter in exaggerated form the difficulties found in the study of domestic costs, but would also meet others that are even more serious. *With rare exceptions the ascertainment of such costs with any degree of accuracy is wholly impossible by an agency of the American government.*

"In its inquiries at home the Tariff Commission is empowered by law to compel any person, firm, or corporation to produce its books or papers and to give all pertinent information under oath in regard to the subject under investigation. The commission has no such power abroad. It must depend upon published materials, the general observations of its agents, and such information as foreign producers may be willing to give. But it is quite inconceivable that the manufacturers of any country would tolerate a detailed investigation of their business by the agents of a foreign government which proposes to use the results as a ground for strengthening the position of its own citizens. Trade secrets, as a rule, are more jealously guarded abroad than in the United States. Foreign manufacturers are more dependent than Americans have been on export markets, and fierce competition in international trade has made them secretive in regard to processes, costs, prices, and business connections. They would raise every possible obstacle to the disclosure of the intimate details of their business to men who, though they might be under pledge as government agents at the time, yet may become the employees of their overseas competitors in the near future.

"The difficulty of foreign investigation is indicated by the following question put by Professor Jastrow to agents of the Tariff Commission at a meeting arranged for them with German manufacturers in 1921.

"'It is suggested that German production costs should be ascertained in order to base American tariff rates thereon. I have followed during the last twenty or thirty years the efforts of the German manufacturer to determine accurately the cost of production of the articles he manufactures, and I have failed to find that any one of them has as yet discovered a method by which he could exactly establish his pro-

duction costs. *As we in Germany do not know our costs of production what reason has the United States for hoping to determine our cost of production which we do not know ourselves?* I should like to know something about the methods which the United States may employ to be able to bring this about.'

"This is testimony on competent authority to the impossibility of finding out with accuracy even domestic costs. Of significance also were articles in the German press during this visit of the commission's agents commenting on the suspicion evident among German manufacturers that the information sought might be placed at the disposal of American manufacturers and that the activities of the agents were in the nature of commercial spying. The Secretary of the National Association of German Industries told the agents that the objection of German manufacturers to giving them information was due in large measure to the nature of the questions asked. They considered such matters as construction, speed, the nature and use of machinery, and the like to be trade secrets and felt that they were under no obligations to disclose them to foreigners. Several manufacturers did indeed furnish reports to the commission's agents, but no opportunity was granted to check them by an examination of books or personal inspection of plants. The reports threw considerable light on the state of German industry, but they were quite general in character, and as was to be expected they included in the main such facts only as would show that high American duties were not necessary.

"Indicative of the attitude of French manufacturers is a report of the American Consul at Marseilles under date of November 15, 1922.

"It a meeting held by French manufacturers on this subject at Paris on October 21, 1922, the principal speaker took the attitude that production costs can

not well be set forth by French manufacturers. He said:

"'There can be no question of hunting out or revealing their costs of production. *The diversity of conditions within any industry is such that investigations of this kind could not give results of practical utility*' * * *

"The meeting * * * agreed with the foregoing attitude and decided to collect information showing merely the proportions in which production has become more expensive in France since before the war. Even these data, which can aid the Tariff Commission very little in seeking to render Section 315 operative, are to be revised and interpreted by the French Minister of Commerce before they are made available. * * * They have always resented investigations by American agents into their costs of production; and it is very doubtful whether such investigations if made without their genuine co-operation, will yield results conforming to the necessities of the Tariff Commission under the rigid terms of the act. It is to be recognized that there is some reason in their argument that it is impossible to establish any staple average for production costs in many industries.

"A letter of December 4, 1922, to the Tariff Commission from its agent in France says:

"They are opposed to and will undoubtedly obstruct as much as possible any investigaitons which the commission may desire to make in France. They have informed me that the French government itself has never been able to pass even a census law which would go beyond verifying the number of establishments and workers therein, and that even for fiscal purposes French officials had difficulties in getting at the books of manufacturers and merchants. That it would, therefore, establish a very dangerous precedent to grant the right to a foreign official to verify costs of

production in France.* * * However, to facilitate the work of the Tariff Commission the Government and the National Association would endeavor to supply the commission with all information of a general character, so that it would be spared the trouble of making a research for statistics distributed throughout numerous publications."

The conclusion can not be escaped that it is rarely possible to ascertain accurately the difference in costs of production at home and abroad. To use as the basis of a general tariff act a thing so fleeting, evasive, and shadowy would be neither right nor possible.

(NOTE.—Dr. Page served on the Tariff Commission from Feb. 21, 1918 to Feb. 28, 1923. At the time of his selection as commissioner Doctor Page's qualifications were widely recognized. In addition to holding of high professional rank as an economist and historian he served the Government in 1911 and 1912 on the United States Tariff Board, the members of which were selected by President Taft. Quoted from 7th Annual Report of Tariff Com., page 1.)

APPENDIX B.

The Honorable Chief Justice of this court, when President of the United States, said:

"The difficulty in fixing the proper tariff rates in accord with the principle stated in the Republican platform is in securing reliable evidence as to the difference between the cost of production at home and the cost of production abroad. The bias of the manufacturer seeking protection and of the importer opposing it weakens the weight of their testimony. Moreover, when we understand that the cost of production differs in one country abroad from that in another, and that it changes from year to year and from month to month, we must realized that the precise difference in cost of production sought for is not

capable of definite ascertainment, and that all that even the most scientific person can do in his investigation is, after consideration of many facts which he learns, to exercise his best judgment in reaching a conclusion."

(Copied from Journal of Commerce & Commercial Bulletin, August 20, 1910, and August 29, 1910; also from a public letter, dated Beverly, Mass., August 20, 1910, to Mr. McKinley, Chairman of the National Congressional Republican Committee.)

APPENDIX C.

President Coolidge, when (after consulting other departments and after pointing out how conditions may change during the progress of an investigation) in making his "findings" declining to follow the Tariff Commission's recommendation upon Sugar, describes this process as one involving choice or discretion in the following words (Sugar Report, July 31, 1924, pp. 216, 217):

"It is obvious from the reports that there is a wide *variety of conclusions* which can be obtained, peculiar in this industry, by *alternative methods of interpretation of the same basic data.* This appears to me to be fundamentally due to the wide fluctuations in the cost of production in different years and in different parts of the industry for which averages have been taken. These variations have been as much as 200 per cent, and in itself seems to indicate that a longer period of more stable conditions is desirable before conclusions. For instance, in arriving at a conclusion from the data in hand it is possible to base interpretations either upon the six-year period which embraces in its first four years a time of great dis-

tortion of costs due to inflation and deflation, or it is possible to base conclusions upon either two or three most recent years. It is also possible to arrive at *different conclusions* based on whether we compare costs of different regions during the time of production or during the time of marketing of the products. It is also possible to *vary conclusions* by the different methods of interpretation involved *in advantages and disadvantages in competition.* Furthermore, as the beet-sugar industry is the one for which we must have utmost solicitude, it is possible to *vary conclusions* by the adoption of that industry as the standard or by the inclusion of all other forms of domestic and insular production, and to still further *vary them* by adoption of the costs of the beet industry in particular States." (Italics ours.)

APPENDIX D.

Philip G. Wright an economist of note who has acted as an expert for the Commission in the *Review of Reviews* for November, 1922, page 502, says:

"In many cases the collection of costs is impossible for the simple reason that they do not exist. What, for example, is the cost of producing wool as distinguished from mutton, of hides as distinguished from beef, of gasoline as distinguished from kerosene, lubricating oil, and a dozen other petroleum products? Where costs can be ascertained it is found that no two manufacturers manufacture at the same cost, and the problem of selection arises. Shall it be the highest or lowest, the average or marginal that is to be used for determining the duty? Wages and prices of materials are extremely uncertain guides. In the case of 29 sugar centrals in Cuba, all having the same opportunities for obtaining labor and materials, the

highest unit cost was more than twice the lowest, with the costs for the other 27 ranging in gradation between."

APPENDIX E.

F. W. Taussig, of Harvard, another distinguished economist and former Chairman of the Tariff Commission, in his address on December 9, 1925, before the American Economic Association, published in the Congressional Record of January 4, 1926, page 1051, says:

> "The point which is important for my present argument is that any decision which is finally reached—any figure which purports to state the differences in cost—necessarily involves the exercise of judgment. No exact and certain conclusion can be reached even by the most perfectly conducted investigation. There is always the possibility of choice between different results, according as you select one or another method of averaging, cover one or another period of time, put your marginal produce or your bulk line at a higher or lower point, consider this figure or that to be the representative one. Even the most competent and impartial tariff commissioner will often have to confess that there is no one figure which can be unqualifiedly said to be the accurate one."

APPENDIX F.

Thomas O. Marvin, present Chairman of the Tariff Commission, at page 26 of the Commission's Report on Wheat and Wheat Products, says, among other things:

> "* * * the experts of the commission were compelled to prepare an *estimated* or *theoretical cost* based upon a system of allocating a percentage of milling costs in the proportion of which *receipts* for mill feed bore to *receipts* for flour."

APPENDIX G.

Excerpt from article of Alfred Pearce Dennis, present Vice-Chairman, United States Tariff Commission—"Tariff Review", June, 1927, No. 6, page 196, etc.:

"* * * Then, too, when we attempt to puruse production costs, we are pursuing an *ignis fatuus*. How about the cost of producing particular items on our American farms? How many farmers are familiar with the principles of cost accounting? Again, how about the immense difficulties of obtaining accurate costs on a coal tar derivative produced in an American steel plant as an incident to the coking industry. Here we are obtaining the cost of a by-product.

If the matter of obtaining accurate production costs is a difficult thing at home, where our accountants are working with the cooperation of the producers, how about the difficulties of obtaining production costs abroad? Here we are working uphill against the prejudice, the opposition, and the suspicion of the foreigner who knows, nine times out of ten, that our real objective is against his interest and that what we are after is an increase in tariff on his goods.

Another question—what part shall transportation play as a factor in production costs? We are only interested in the competition of Belgian plate glass when it makes its appearance in one of our principal markets. Shall the cost of production of Belgian plate glass be based on its cost laid down in Antwerp, in New York, or in Detroit, the *principal* consuming market in the United States?

Again, articles to be matched in cost comparison must, in the language of the statute, be like or similar. What does this mean? Does it mean that you can

compare the cost of Swiss cheese made in Switzerland with the cost of Swiss cheese made in Wisconsin? Would you raise the Tariff on Gorgonzola cheese produced in Italy because an imported pound of it tends to displace a pound of Cheddar cheese produced in the United States? Russian caviar is one of the rarest and most expensive foods in the world retailing from $5 to $20 per pound. Is it like or similar, within the meaning of the statute, to the American caviar obtained from the whitefish and Delaware River sturgeon selling for $1 per pound.

Further, when it comes to cost accounting methods, how obtain the costs of producing American caviar? If the allocation method is chosen, as in some of our investigations, the cost of the catch in representative waters must be ascertained and a correct proportion allotted to whitefish and to Delaware sturgeon, and the ratio of eggless to egg bearing fish determined—a task that might reasonably engage the attention of our experts for years.

Again, when it comes to obtaining costs, what costs are representative? Are the costs of producing pig iron in Birmingham, Ala., where the furnaces practically sit astride the ore, fuel and fluxing materials, representative? Or shall we take Pennsylvania mills, where the assembly costs of the raw materials run as high as ten or twelve dollars per ton, as representative.

Another question, when it comes to equalizing costs of production, how about the marginal producers, the people who can only operate at a profit under favorable conditions? How about adjusting the tariff to equalize costs in the case of stagnant, antiquated, mismanaged industry? Is it not fair to ask that geographic, climatic, industrial and technical conditions permit of production at a price which will enable the industry to compete without an excessive amount of coddling?

How about a duty on olive oil, when native oil is produced successfully in but one small circumscribed district with the output representing less than one per cent of the national consumption?

* * * * * * * * *

Not to labor the subject, every case that comes before the Tariff Commission bristles with controversial points and it so happens that the more conscience and intelligence a man puts into an examination of these questions, the less likely he is to go along with his colleagues in presenting an unanimous report to the President.

Suppose the experts of the Commission were able to obtain sound and adequate production costs both at home and abroad. As a practical proposition neither the Tariff Commission, nor the entire weight of Government itself, could compel foreign manufacturers to produce their books and disclose their costs. The French Government looks upon the admission of our cost accountants into France with great disfavor. French manufacturers tell us that their own government would not think of asking them to open their books to government cost accountants. A man's factory, like his home, is his castle.

Light is thus shed on the difficulties of working our flexible tariff. The results of four years of operation have been meager and unsatisfactory. Up to date, 561 applications have been filed for changes in rates. Only 63 investigations have been instituted. Only 23 reports have been completed and sent to the President. Rates have been raised in 13 cases. Duties have been lowered in two cases—both of despicable unimportance, live bob-white quail imported from Mexico, and paint brush handles imported from Canada.

The President has proclaimed no change in five cases and taken no action in three. Certain impor-

tant investigations, such as carbolic acid, plate glass, and lace have been in progress for four years. On the average, it has taken something like two years to get a change in duty."

APPENDIX H.

Preliminary report of the Tariff Commission, No. 58, January 9, 1928, on "Onions"—Problems Presented for Discussion. A typical illustration of what our opponents had the temerity to call a mere fact-finding-process.

The attention of interested parties is particularly invited to the following questions:

1. a. Are the crop years 1925 and 1926 representatives years for purposes of cost comparison?

b. What year or other cost period should be used as a basis of cost comparison?

2. In a comparison of costs of production of late strong onions with Egyptian onions, how should the storage costs of domestic onions, held until the arrival of the Egyptian onions, be considered?

3. a. What losses in transit due to spoilage, sprouting, etc., is normally to be expected with respect to:

(1) Imported Spanish onions—
  (a) in the summer months;
  (b) in the fall months;
  (c) in the winter months.
(2) Imported Egyptian onions.

b. To what extent are these losses in transit anticipated and taken into consideration in making foreign purchases?

c. Table 42 shows a substantial charge for reconditioning, i. e., regrading and packing imported Spanish onions

Is there a similar charge incurred in connection with imports of Egyptian onions? Domestic onions of any type?

4. Discussion is invited as to how far the invoice data given in this report may be taken as indicative of costs of production of onions in Spain and Egypt? Are any adjustments necessary to make the invoice data, as presented, indicative of foreign costs of production?

5. A comparison of New York market prices on imported Spanish onions given in Table 19, with average c. i. f. New York prices given on invoices, indicates that the duty paid invoice price is considerably higher than market quotations. Discuss the reasons for this difference.

6. What is the cost of loading onions on lighters for reshipment from New York to inland points:

7. Since 1924 imports from Egypt have become increasingly important as compared with those from Spain.

a. What was the cause of the large import from Egypt in 1927? Is it probable that imports in 1928 and subsequent years will be greater or less than in 1927?

b. What is the cause of the relatively small import of Spanish onions so far in the 1927-1928 season? State what you think will be the probable course of imports from Spain during the remainder of the present season. In subsequent seasons.

c. A thorough discussion is invited on the evidence in respect to the principal competing country.

8. With respect to Egyptian onions—

a. What proportion of the imports at New York was reshipped to other cities in 1925? In 1926? In 1927?

b. What proportion of imports at Boston was reshipped to other cities in 1925? In 1926? In 1927?

9. With respect to Spanish onions, what proportion of imports at New York was reshipped to other domestic markets in 1925? In 1926? In 1927?

10. Why is it that so few Egyptian onions go west of the Atlantic seaboard?

11. Do imports of Egyptian or Spanish onions have the greater effect on prices of

a. Domestic strong onions?
b. Domestic Bermuda onions?
c. Domestic Spanish onions?

12. Domestic Bermuda onions usually sell at a higher price than Egyptian onions on the New York market. Discuss the reasons.

13. a. Why do imported Spanish onions sell at much higher prices than the domestic Spanish onions?

b. What part of the price premium on imported as compared with domestic Spanish onions, which on the Chicago market averaged $2.51 per hundred pounds in 1926, is due to superior grading and packing? How much to other causes? Specify the other causes and estimate their relative importance.

c. Are domestic Spanish onions, as ordinarily packed, more comparable with imported Spanish onions packed 50 to the crate or 72 to the crate?

d. Should a cost adjustment be made for the difference in grading and packing of domestic and imported Spanish onions? If so, on what basis should such an adjustment be made?

14. a. In which market is the largest consumption of Spanish onions?

b. In which market is the consumption most evenly divided between the imported Spanish and domestic Spanish onions?

15. a. What is the nature of the competition between domestic strong onions and the Egyptian onions?

b. Would it be economical to expand the domestic supply of onions to take the place of imports from Egypt?

(1) By an increased production and storage of domestic late strong onions?
(2) By growing more domestic Bermuda onions?
(3) By raising more early strong onions?

16. a. Should onions of all types be treated as like or similar articles for purposes of Section 315, or

b. Should strong and Spanish onions be classified separately for purposes of Section 315? How should Bermuda onions, some of which come from Mexico and other sources, be classified?

17. Data have been obtained for imported Spanish and Egyptian onions and for three distinct types of domestic onions—strong, Bermuda, and Spanish.

a. Assuming that all onions should be subject to the same duty, what comparison should be made in order to determine differences between domestic and foreign costs of production for purposes of Section 315?

b. Assuming that different types of onions should be subject to different duties, what comparison should be made in order to determine differences between domestic and foreign costs for purposes of Section 315?

* * * * * * * *

CHIEF MARKETS.

Table 13 gives for the twelve largest onion-consuming markets of the United States, statistics of unloads of domestic and imported onions in the years 1925 and 1926. Unloads of domestic onions are classified as to source and as far as possible as to type. The data in this table are subject to the same qualifications as those in the preceding table.

Shipments of imported Spanish onions rarely go farther west than Omaha, Kansas City, and Chicago, but occasionally go as far west as Denver. There are no imports from Spain at Pacific Coast ports.

The data in Table 13 indicate that New York consumes more onions, both imported and domestic, than any other city of the United States. In the consumption of domestic onions only and of domestic and foreign onions taken together, Philadelphia was second and Chicago third in 1925, and Chicago second and Philadelphia third in 1926; in both years Boston was fourth and Detroit fifth. In the consumption of imported onions, Boston was second in both years, and was followed in the order named by Philadelphia, Chicago, and Detroit.

Imports form a larger proportion of the total consumption of onions in New York than elsewhere, even when allowance is made for reshipments. Imports of Egyptian onions form a larger proportion of total consumption of strong onions in New York and Boston than elsewhere. New York leads in the consumption of imported Spanish onions and, like other eastern markets, receives only occasional shipments of domestic onions of the Spanish type. In Chicago, however, both domestic and imported Spanish onions are consumed in large quantities, and consumption seems to be more evenly divided between them than is consumption in any other large onion-consuming center.

(NOTE.—The above is a demonstration as to how choice of the domestic market is bound to affect the final figure arrived at. And how transportation costs will vary according as the seaboard or internal domestic market place is chosen for comparison; also affecting the result and compelling the use of discretion.)

APPENDIX I.

United States Tariff Commission's Report on Wheat and Wheat Products, March 4, 1924 (p. 26); statement by Thomas O. Marvin, present chairman of Tariff Commission:

> "In consequence, the experts of the commission were compelled to prepare an estimated or theoretical cost

based upon a system of allocating a percentage of milling costs in the proportion which receipts for mill feed bore to receipts for flour. As the business is actually conducted, mills merely credit or deduct feed at the current price from their total costs; the higher the price of feed the lower can they quote for flour. According to the testimony of millers, $1 per ton upon mill feed amounts to about 3½ cents per barrel of flour."

II.

STATEMENT BY OTHER MEMBERS OF THE COMMISSION.

Page 28:

"The applications of the data which, in our judgment, warrant and require the foregoing determinations will now be stated.

"With respect to the data on wheat the following alternatives present themselves:

"1. Shall the costs for the year 1923 be applied or shall the average of the costs for the years 1921-23 be applied?

"2. Shall the difference between American and Canadian costs be measured between points representing a weighted average cost in the two countries respectively, or at a point representing a cost at or below which the bulk of the American product is produced?

"3. Shall account be taken of differences in costs of transportation from the points of production to some assumed common market in the United States?"

III.

STATEMENT BY STILL OTHER MEMBERS OF THE COMMISSION.

"It seems clear to us (1) that 1923 costs should be applied; (2) that the difference should be measured

at a point covering the bulk of American production; and (3) that transportation costs should not be taken into account."

Pages 31, 32:

"No one statistical device can be accepted as controlling, the effect of which is to enable the domestic demand for the product to be supplied at a price level which would eliminate a large proportion of American producers.

"Any assumption that the weighted average cost is preferable because it would permit a determination of cost differences with greater mathematical precision is a mistaken assumption. The data collected in this investigation are not the costs of all the hard spring wheat producers in the United States and in Canada. They are the costs of a limited number of representative producers in certain representative areas. Any automatic weighted average of the entire hard wheat production in each country is therefore out of the question. In any event, the conclusion rests upon premises arrived at as a result of a process of representation. Nor is this all. The very object of this investigation is the ascertainment of representative costs. No cost can be representative which does not reflect cost of the bulk of production. If any statistical method or process is not fitted for the ascertainment of a unit cost of the bulk of the domestic product, it is to that extent defective and inapplicable. To adhere to it upon the assumption that it has greater mathematical precision involves an implication of certitude which is delusive."

Page 38:

"But not only would an investigation confined to the costs of the 1923 crop (assuming that it could be

completed by March, 1924), prove futile for the present emergency; it would be equally useless for determining what, if any, duty is normally required to equalize the differences between foreign and domestic costs. For that purpose, the investigation, as in other cases, must cover a period sufficient to indicate the *advantages and disadvantages* in competition which the duty is assumed to measure and equalize. Thus a hurried investigation would be neither an immediate remedy for the present crisis nor an effective application of the statute in general."

Page 40:

"The chief witness who testified in the commission's public hearings with reference to the application of the bulk line was Prof. R. E. Willard, a farm economist of the North Dakota Agricultural College, who appeared in behalf of a committee of farmers, bankers and business men of North Dakota. Professor Willard said in part (stenographers' minutes, United States Tariff Commission, February 18, 1924, pp. 332-335):

"'The question of the bulk line is a rather *theoretical* and *sometimes vague proposition*. Bulk line is usually determined in the range of costs at a point where it is supposed that if the price were placed at that point, it will maintain a certain standard or a certain quantity of production. In other words, in all lines of production there are those who are on the upper extreme in costs and those who are on the lower extreme. The bulk of the commodity that is required for consumption is the object sought for, and if there is too much production the bulk-line point may be lowered in order that the greater number may be in the high cost class, while if there is too little, the price may be established at a point to increase production,

105

and therefore the point would be raised in the scale of costs, and there would therefore be a less number producing at a loss than in the other case. Whether the same bulk-line point should be established in Canada as in the United States, if we were to consider the two propositions, is a matter, it seems to me, that the commission would have to determine, based upon the desired result. If it is desired to increase production in the United States, the bulk-line would be placed low in the scale. * * * It is just the reverse. It would be placed in the scale so that there would be a less number producing at a loss. * * *'"

APPENDIX J.

From published preliminary statements of the Tariff Commission which illustrates the various questions, factors, choices, methods, problems, etc., involved in the actual operation of the cost of production formula. These show conclusively that the process consists of the exercise of a purely "legislative discretion." These are the kind of problems on which they ask for light:

Men's Sewed Straw Hats—Tariff Commission's Preliminary Statement, March 21, 1925:

Page 26:

Comparison of prices. This shows two things: (1) Estimation by the Commission of the jobbers' prices from *retail prices*. (2) "Like or similar." No Italian hats costs found like domestic articles and only a few compared (in the opinion of the Commission) with English ones.

Page 28:

Table 17—Liabilities—Employees' Insurance Fund. Meaning costs by looking up this fund from capital,

including loss of interest thereon. Sub-section (c) provides for labor costs, including wages, and, of course, "advantages or disadvantages." Is the fund a labor cost? It is, of course, comprised in "advantages or disadvantages."

Page 31: Following is a quotation from this page:

"1. *Selling Expense:*

"Shall marketing costs be taken into consideration in this investigation for the purposes of Section 315?

"Are the costs incurred by importers in maintaining representatives and offices in the United States comparable with the costs incurred by domestic manufacturers in dealing directly with retailers?

"Should the purchasing expense of importers be considered a part of the costs of marketing foreign hats in this country?

"2. What method of grouping of foreign and domestic costs should be employed to insure the comparison of hats of similar quality?

"What other grouping, if any, should be employed?

"3. *Distribution of Overhead Charges:*

"Comment is invited on the method of distribution of overhead charges described on page 16."

II.

Cheese, of the Types Known as Swiss Cheese. Tariff Commission's Preliminary Statement, November 10, 1925:

Page 21:

Prices are taken into consideration in determining cost differences.

Page 27:

Cost computed in *three ways,* which the President has to choose from.

Page 43:

Income factors—*Sales, Allocation, Method.*

Page 49:

"It was possible to compute the cost of milk production from the records *only on the farm basis.* The cost of distribution was made by the use of the sales *allocation method.*"

Page 55:

Transportation costs.

Page 68:

Gross farm returns—*farm method.*

III.

METHANOL.

Commission's Preliminary Statement, May 5, 1926.

Page 2. Questions for discussion:

"(1) In this statement, the cost of distilling a cord of wood is allocated to each of the three principal products (crude methanol, acetate of lime and charcoal) on the basis of relative sales return from each product. Is there a preferable method for computing costs of methanol for purposes of Section 315?

"(2) If the relative sales return allocation method is used, should costs for each period for which costs were obtained be calculated on the basis of sales returns for the corresponding period, or for a longer period, e. g., the 3½-year period from January, 1922, to June, 1925?

"(3) Should the refining cost applicable to pure methanol be taken to be equivalent to the weighted average refining cost per gallon of all refined products made as shown in the report, or should some other basis be used?

"(4) Which of the following methods should be used for the determination of transportation charges to refineries or domestic crude methanol?"

Page 4:

Joint Products and By-products.

Page 16:

Prices taken in determining cost of Production.

Page 30:

Use of sales values—*Allocation Method.*

Page 31:

"In order to minimize the effects of temporary price fluctuations and to obtain a more broadly based percentage figure for use in the distribution of costs on the sales allocation basis, for plants whose costs have been used, there has been computed in Table 12 for the 3½-year period from June, 1922, to June, 1925, the weighted average value of sales of crude methanol, acetate of lime, and charcoal, and the ratio of the value of each to the weighted average return from all three products."

Page 34:

"As cost data could be obtained for the first half of 1925 from only one refining plant, no statement of

costs of refining in that period can be made public. Nevertheless, it may be stated that a comparison of the 1924 and 1925 costs for that plant, which is one of the largest engaged in the business, indicates that refining costs in the first half of 1925 were but slightly less than in 1924. For this reason the refining costs shown for 1924 may be considered as representative of both periods. On this assumption all unit costs for refining shown in the tables which follow are those for 1924 only."

IV.

MILK, FRESH; SOUR MILK AND BUTTERMILK; AND CREAM.
Tariff Commission's Preliminary Statement,
March 30, 1926.

Page 5:

Problems for discussion,

Page 5:

"2. Should the domestic study be confined to areas producing milk for those cities in which the imported milk is consumed?

"3. Should the study be limited to areas producing milk of the same grade or quality as that imported?

"4. Table 4 shows that imports of sour milk and buttermilk during 1925 were valued at only $17,000. How shall these commodities be handled in this investigation?

"5. Should all milk costs be on the basis of milk containing a given percentage of butterfat? If so, what percentage of fat content should be considered as standard?

"6. What are the chief producing centers in Canada that export milk to the United States?

"7. In what producing areas in the United States and Canada should cost data be obtained?

Cream:

"8. (a) What are the consuming markets for imported cream?

(b) What is the grade or quality of imported cream and what are its uses in the chief markets?

"9. Should the investigation be limited to areas producing cream for the markets which now consume imported cream?

"10. Should the mid-Western States shipping cream to the Eastern markets be included in this investigation? What is likely to be the future development with respect to long distance shipments?

"11. What are the chief producing centers in Canada that export cream to the United States?

"12. Should all cream costs be on the basis of cream containing a given percentage of butterfat? If so, what percentage of fat content should be considered the standard?

Page 6:

"13. In what cream producing areas in the United States and Canada should cost data be obtained?

General:

"14. Do importers buy milk and cream direct from farmers or from dealers?

"15. Are imported milk and cream bought on yearly or short-time contract?

"16. Aside from price difference, what advantages or disadvantages do importers have as compared with buyers of domestic milk and cream?

"17. How does the loss due to spoilage in the imported trade compare with that in the domestic trade?

"18. To what extent do imports of milk and cream supplement seasonal variations in domestic production?

"19. To what extent do prices of milk and cream in the New York and Boston markets affect prices in other markets?

"20. Maps 1A, 1B and 2 indicate that the milk and cream supplies of the large markets originate to some extent in different zones. Will this difference in source necessitate two separate cost studies for milk—

(a) for areas producing milk primarily for fluid milk consumption, and

(b) for areas producing milk primarily for cream consumption?"

V.

SUGAR.

Tariff Commission's Preliminary Statement, December 1, 1923.

Page 24:

"In approaching the problem of ascertaining the difference in cost of production as between the United States and Cuba, it is necessary to consider the following points which, among others, appear to be of fundamental importance, and to which interested parties are requested especially to address themselves at the hearing:

"1. The choice of the year or years to be used as a basis for cost comparison.

"2. The form of average, if any, or type of cost to be used. (Arithmetical average, bulk line costs, representative costs, etc.)

"3. Treatment of transportation and marketing costs, including the claim for 'contract allowance' to cover marketing disadvantages.

"4. The method of determining the allowance to be made for conversion of raw sugar and various Louisiana grades into refined sugar (refiners' costs, refiners' margins, etc.).

"5. Treatment of invested capital in relation to cost of production.

"6. Claims by producers in all regions of sugar production for inclusion in cost of the losses suffered by them as a consequence of the abrupt drop in sugar prices in 1920 and 1921 on money advanced to planters and growers, not recoverable."

Tariff Commission's Second Preliminary Statement, March 18, 1924.

Page 27:

"Comparison is perhaps more uncertain in the event that some areas are overvalued, whereas other areas are undervalued. In making a comparison of investment charges under these conditions a number of questions must be taken into consideration, such as the following:

1. Have differences in economic, financial and climatic conditions in the various sugar areas within recent years effected the validity of book values of the producing companies to the extent that book values are not strictly comparable?

2. To what extent has the greater proportion of the sale or reorganization of sugar companies in recent years in some areas as compared to others unequally affected the book valuations among the areas?"

VI.

Crude and Caustic Calcined Magnesite

Tariff Commission's Preliminary Statement of May 19, 1926.

Page 3:

"No cost data were sought or obtained through foreign field work, but prices, sales records, and the cost

of distributing magnesite were obtained from the importers of the lower part of the caustic magnesite imported into the United States. All data obtained in the investigation which are not of a confidential nature are herein presented for the information of interested parties."

Page 20:

"*Adjustment of Book Costs.*—Adjustments were made only where cost items as obtained from producers obviously involved expenses which could not for purposes of Section 315 be included in cost of production. Adjustments were made to eliminate from cost such items as federal income tax charges, interest and discount, commissions on inter-company transfers, depreciation not distributed to life of lease, installation and rehabilitation of plant charged to cost instead of investment.

Investment.—The Commission obtained information as to the investment in fixed assets at cost and at depreciated value for 1924 for one domestic company. No similar data were available for other domestic producers, who operate leased properties and pay royalties and rents which have been included in costs. *No investment data have been obtained for foreign firms.*"

Page 22:

"The analyses of imports are based only on entries for which invoices have been liquidated and as to which protests have not been filed."

Page 28:

"*Area of competition.*

The market distribution of domestic and foreign caustic magnesite in this country for the months of

September, October, and November, 1923, and the same months of 1924, was the subject of a special study by the Tariff Commission. The geographic center of consumption for the domestic product was found to be about midway along the Ohio-Michigan border, and was moving south. The corresponding center for the foreign product was near Harrisburg, Pa.; and was moving west. The center for the combined domestic and foreign product was between Cleveland and Youngstown, Ohio, and was moving southwest.

Table 17 shows the relative proportions of foreign and domestic caustic calcined magnesite sold during September, October, and November, 1923 and 1924 in the comparative area."

Page 34:

"1. Are there any substantial chemical or physical differences between Indian, Grecian, or domestic magnesite?

2. Are differences in color of the various high grade magnesite reflected in market demand or prices?

3. To what extent, if any, is the degree of competition between the foreign and domestic magnesite in the principal centers of consumption determined by (a) quality; (b) trade preference; (c) price?

4. What are the important consuming centers and principal markets in the United States for domestic and imported caustic magnesite?

5. Are cost comparisons for the *year 1924* representative of the differences in cost of production in the United States and foreign countries?

6. In the absence of direct evidence from producers' books of the costs of production of caustic calcined magnesite in Greece and in India (no attempt having been made by the Commission to obtain such book costs), is it permissible under the statute to resort to invoice prices of the product mined in each of these

countries for the purpose of arriving at the cost of production in the principal competing country?

7. If invoice prices can be resorted to for the purpose stated in question 6, what elements, if any, included in the invoice prices should be regarded as not included in the cost of production?

8. What methods of computation by way of allowance, deduction, adjustment, or otherwise, should be applied to invoice prices of the imported product in order to ascertain therefrom the cost of production of the imported product?

9. Is it permissible under the statute to resort, in any event, to invoice prices for the purpose of arriving at the cost of production where the data indicate that the spread between the domestic cost of production and the invoice price of an imported article is not such as to permit the maximum increase or decrease under the statute?

10. Should cost comparisons for the purpose of Section 315 be based upon costs of production and of distribution of all caustic magnesite produced in the United States, or should only the costs of production and of distribution of the magnesite actually entering the selected principal competitive market or markets be used as a basis of camparison?"

VII.

Cherries, in their Natural State, Sulphured, or in Brine.

Tariff Commission's Preliminary Statement, May 27, 1927.

Page 3:

I. *Problems confined to cherries, sulphured or in brine, pitted or unpitted.*

1. Is the period covered by the investigation (crop year 1926-1927) a representative period for determin-

ing differences in cost of domestic and imported cherries?

2. The costs of producing Italian cherries are converted into United States currency on two bases: (1) the average rate for the month period May to October, 1926 and (2) the average rate for the crop year May, 1926 to April, 1927. Which of these two bases is preferable for purpose of cost comparison? Suggestions as to any other suitable method are invited.

3. Are domestic and imported cherries of similar variety, type and quality?

* * * * * * *

(a) What use should be made of transportation costs and other incidental charges upon domestic and imported cherries in connection with a cost comparision for purpose of Section 315?

(b) What is the principal wholesale market or markets for domestic cherries in the United States? For imported cherries?"

Page 39:

"*Judicial Decisions.* How is the President going to *classify* in view of the court's decisions on cherries."

VIII.

FLUORSPAR.

Tariff Commission's Preliminary Statement, June 21, 1927.

Page 3. Problems for discussion:

"2. Is there a substantial difference between the calcium fluoride content of domestic and imported gravel spar? If so, what adjustment should be made in cost of production for difference in quality between the domestic and imported gravel spar?

3. If invoice prices be used as evidence of foreign costs of production of fluorspar, should these prices be considered to include (a) imputed interest on investment, (b) foreign producer's selling expense, (c) profit?

4. Is 1925 a representative year for purposes of cost comparison?

5. (a) What are the principal market or markets in the United States for domestic and imported fluorspar?

(b) For what city or cities, as the principal market or markets, should cost comparisons be made for purposes of Section 315?

6. (a) Should the respective costs of domestic and imported metallurgical gravel fluorspar be used as a basis for adjusting the rate of duty on all grades of imported fluorspar?

(b) If not, should gravel, lump, and ground spar be separately classified for tariff purposes?

7. Is the degree of purity of commercial flourspar a sufficient criterion on which to base separate classification for tariff purposes?

8. If, for tariff purposes a *reclassification* by grades is desirable, what method of grading and description of grades would be distinctive and adequate to determine

(a) classification by size of article?

(b) classification by degree of purity?"

Page 30:

"*Depletion of royalty.*—The books of most producers showed depletion set up at rates which checked closely with an average rate for the entire producing district as calculated by the commission from its own ore estimate. For more than 83 per cent of the crude ore mined, depletion rates used by the producers were

accepted; to the remaining production, for which producers' data on depletion were inadequate, an estimated rate was applied. The customary royalty in the Illinois-Kentucky district is $2.50 per ton of marketable spar. Two producers, whose costs are included, paid royalty on the finished product which was reduced to the basis of crude ore and included instead of depletion."

Page 31:

"*Allocation of expense to processes.*—Books of the producers usually show mining expense properly segregated. The expense of sorting, concentrating, and grinding was in many cases not so segregated, so that allocations of expenses other than labor were made by the commission to the separate stages of the process on the basis of labor cost in each stage."

Page 47:

"*Costs at points of Consumption.*—It is possible that comparisons for purposes of Section 315 should be confined to costs of production and transportation of domestic and imported gravel spar, as this grade constitutes about 79 per cent of total sales in the United States, 85 per cent of domestic production, and 78 per cent of imports.

Imported lump spar is not fully comparable in grade with the domestic and there is no certainty that invoice values reflect costs of production.

Ground spar constitutes about 9 per cent of total sales in the United States and 8 per cent of domestic production, but only 2 per cent of the imports of fluorspar. Data regarding the relation of invoice values to costs of production are lacking. Except along the Atlantic seaboard higher delivered costs prevail for the imported than for the domestic ground spar."

IX.

Certain Vegetable Oils.

Tariff Commission's Preliminary Statement
April, 1926.

Page 2:

"Coconut Oil.

* * *

5. Three methods for allocating a part of the cost of crushing a ton of copra to coconut oil are shown on page 15. Which of these or what other method results in a cost most closely approximating the actual cost of production?

6. Should the quantity of imports, the quality of imports as compared with domestic production, or other competitive factors govern in determining the principal competing country for purposes of section 315? Discussion of the legal as well as the economic aspects of this question is invited.

Cottonseed Oil.

* * *

8. Three methods for allocating a part of the cost of crushing a ton of cottonseed to cottonseed oil are shown on page 35. Which of these or what other method results in a cost most closely approximating the actual cost of production?

In connection with this question attention is called to the different products obtained from crushing cottonseed in various countries. For example, in Great Britain oil and cake are the only products, while in the United States and China, oil, cake, hulls, and linters are obtained.

9. Should the quantity of imports, the quality of foreign oil, or other competitive factors govern in determining the principal competing country for purposes of Section 315? Discussion of the legal as well as the economic aspects of this question is invited.

* * *

Soya-Bean Oil.

* * *

14. Since China in 1923-24 experienced an unusual wet season, which resulted in beans of a low-oil content, shall the Chinese costs for 1923-24, or those of 1922-23, or the average of the two periods, be used as the basis of comparison with domestic costs?

15. On page 73 the cost of crushing a ton of soya beans is allocated to soya-bean oil on the basis of the relative sales return from each product. Does this method or some other method result in a cost most closely approximating the actual cost of production?"

Page 27:

"In the United States the products other than oil obtained in crushing cottonseed are cake or meal, hulls, and linters. The oil cake and the hulls serve as cattle feed and for fertilizer; the linters are used for mattresses, felts, low-grade yarns, and in the manufacture of pyroxylin plastics and lacquers, artificial silk (rayon), and gun-cotton, the raw material for smokeless powder."

Page 37:

"*Transportation and other charges.*—The cost of shipping cottonseed oil from China to the United States is another factor entering into the competitive situation between Chinese and domestic oil. Prac-

tically no Chinese cottonseed oil has been shipped to the United States in recent years and therefore no accurate transportation data are available. Shipping charges for cottonseed oil would, however, not differ greatly from those for soya-bean oil, which amount to about $19 per net short ton from Dairen to the Pacific Coast and about $23 to the Atlantic Coast."

Page 56:

Joint Products.

Soya beans contain about 18 per cent of oil. The yield of oil by crushing runs from 10 to 13 per cent. They also yield, as a joint product, oil cake, which, when ground to a meal, is used as cattle or poultry feed or as fertilizing material. Owing to local markets in the United States for meal, the cake is regarded by the producers as the major product and the oil as a minor product. The consumption of soya-bean cake is increasing because of its high rank as a feed.

Because of the demand for both oil and cake in Europe, these countries prefer to import whole beans from the Orient to be crushed after arrival."

X.

NINTH ANNUAL REPORT OF THE UNITED STATES TARIFF COMMISSION.

December, 1925.

Page 16:

"(a) As pointed out in that report, the specific duty can not in any event be increased or decreased more than 50 per cent, no matter what may be the cost difference shown by investigation. In the case of an ad valorem duty, on the contrary, when a 50 per cent increase fails to equalize such cost differ-

ences resort may be had to assessment upon the American selling price. In this case, to be sure, the rate of duty may not be increased, but it is obvious that under certain conditions the duty upon the different and presumptively higher basis of assessment may be greater than the existing duty by more than 50 per cent. This may be the case although the statute has a distinct provision that 'the total increase or decrease must not exceed 50 per centum of the rates specified' by Congress either in the present act or in any amendatory act. *It may also be noted that in the case of ad valorem duties, as in the case of specific duties, the ascertained differences in cost of production can not under the limitations of the statute always be equalized, whether such equalization calls for an increase or a decrease.*

The obstacles in the way of an equal application of the principle of cost equalization may be illustrated by reference to an investigation in which some classes of the same articles were subjected by the same paragraph of the tariff act to specific and to others by ad valorem duties, in such case it is quite obvious that an identical cost difference might result in the imposition of quite different duties." (Italics ours.)

XII.

BUTTER.

Report of the United States Tariff Commission
to the President of the United States,
February 25, 1926.

Page 23:

"Divergent Views On Centralizer Costs.

The views held by Commissioner Marvin, Glassie, Baldwin, and Brossard on this subject may be stated thus:

Although farm-cost data were obtained in certain of the areas from which centralizers draw their supply of cream, no attempt was made to cover all centralizer areas. The reasons for not attempting a general farm-cost survey for all centralizer regions may be stated as follows:

In the first place, the great mass of butter produced by centralizers, in point of grade and quality, is not comparable either with the imported Danish butter or with the butter (similar in grade to the imported) produced by domestic comparatives and small independents. Undoubtedly some centralizer butter is of a grade comparable with the butter just mentioned; but the quantity of such high-grade centralizer butter is relatively small compared with the total production of centralizer butter. Nor is it possible to segragate out of centralizer costs in general the special production-costs of such portion of their butter as might be considered comparable with Danish butter. It might indeed be possible to select here and there a centralizer whose product is habitually of that high grade. Such centralizer product being the exception rather than the rule, these isolated cost data would not be representative of centralizer costs in general, nor would they represent a large proportion of the total production of high-grade butter. Thus their use would be at once meaningless and invalid."

Page 63:

"* * *. A farm, however, is a good deal more than a factory. It is a place to live and I feel that a serious error has been made in putting a money valuation on the service of a farmer and his wife and children in the dairying business. The character of the work itself is intermittent and self-administered. It is impossible in the case of a farmer to state, as in the case of a factory worker, that his time is

valued at so many hours out of every day with so many days of work in every week. I am confident that with the best intentions our farm cost accountants have imputed value to time which has not actually been occupied by the farmer and his family in dairy work, just as they have imputed value to roughages, such as straw, which really have little or no market value."

Page 64:

"3. The majority of the commission, to fortify its indication of a substantial increase in the present duty of 8 cents per pound on butter, has made no use whatsoever of the costs of production of the centralizers of the United States, which produce approximately one-half of the creamery butter of this country, and has inconsistently included cost data for the smaller independents which buy their butterfat from the farmers in the same manner as do the centralizers. Of the plants investigated by the commission's accountants, 72 were centralizers, 32 were smaller independents, and 57 were cooperatives. Similarly, the majority of the commission bases its conclusion, without any attempt to make reasonable deductions, on farm cost data which are not of the same

Page 65:

kind or of comparable accuracy with the industrial cost data the commission has secured in other investigations, and which the commission is apparently not authorized to employ without an amendment of section 315 specifically directing the commission to use such farm cost data, however consciously or unconsciously exaggerated, in agricultural investigations, in place of the present requirement that the commission

shall present genuine cost of production comparisons. Stated otherwise, it is the commission's duty under the law to find the farmer's actual production cost, and not to build up a statistical basis for measuring the price which the farmer in fairness ought to receive for his butter—for which purpose the commissioner's farm cost data are serviceable.

* * * * * * *

In other words, a majority of the commission has cast aside the national cost of producing butter in the United States under the actual conditions under which the butter industry, so far as it is reasonably efficient, is organized in this country, and, instead, has tendered for comparison with Danish cost data certain selected and relatively high United States butter cost data, thereby omitting altogether the cost of producing approximately one-half of the commercial butter of the United States, much of which is comparable and competitive with Danish butter."

Page 81:

"*Feeds, pasturage, and estimated wages.*—Farm-management experts properly use their approximations to determine what are the most profitable lines of farming, but it is submitted that such experts—and certainly the Tariff Commission—should not extend the use of such approximations to purposes for which they are inadequate. The commission's accountants may with justice have believed that it was impracticable to find the cost of production of feeds in the United States and the exact credits which should be charged for the use of farms as homes, but in the absence of such data there should be frank admission that, so far as farm costs go, the commission did not obtain the information required by section 315 for a readjustment of the duty on butter."

Page 83:

"*Absence of farm records.*—Another serious limitation on the use of the farm cost figures obtained in the butter investigation arises from the fact that practically no farmers keep adequate records for accurate cost findings. In any important accounting undertaking the correct allocation of indirect cost to specific articles is always a difficult and expert task. Necessarily, therefore, when there is no bookkeeping record the margin of error is increased. To illustrate, in the present investigation one of the commission's special experts, who is familiar with industrial cost finding, was surprised to learn that reluctant farmers, who happened to be visting a cooperative creamery, were induced to answer from memory certain questions as to their costs and to give approximations which were taken down and used as direct cost data."

APPENDIX K.

Tariff Commissioner Brossard, who had formerly worked as field expert for the Commission, graphically described to the Senate Investigating Committee, pursuant to S. Res. 162, the process by which so-called representative costs were obtained on Wheat and Sugar; how the averaging was done and how the weighted average or bulk-line was applied.

Part VIII, pages 946, 947, 948, etc., of the printed Hearings before the Robinson Committee.

We submit that his testimony can not be read without seeing legislative discretion, judgment, choice between different results, guessing, and arbitrary action, throughout the entire process.

Among other things he said:

Pages 946/7:

"Mr. Brossard: In this investigation we used the the following method: We took the wages of the farm labor that were actually paid, in some instances, on the individual farms, where the farmer had a hired man. Suppose we paid him $40 a month, we allowed the farm owner, if he did the work on the beets, that same wage, or $40 a month, not allowing him anything additional at all for his supervision or his management or his extra or longer hours, but simply allowing him the workmen's wage. That is the method by which the wage was determined for the owner.

The labor of grown children or young men who were at home was prorated on the basis of that wage paid to the hired labor. There has been some criticism of this method of valuating labor, saying that the wages are jacked up because the farmers do not get that much for it; because they are willing to work for less; but, in all fairness, I think that wage has been accepted by all agricultural economists, and it is stated in these reports.

Senator Reed: Did you make no allowance for the other advantages given to hired labor, besides money paid?

Mr. Brossard: Oh, yes. We took an evaluation of the other advantages, which we called perquisites. Suppose the hired farm labor, for example, was given $40 a month and a house to live in; of course, the value of the rent of the house was added to that wage. The same with the rent of the garden spot or anything he might have gotten. It was valuated at the basis of its value at the farm and added to the wage as part of the wage. But, of course, there are two ways of figuring this. They are given in the United States Department of Agriculture yearbooks. The wages are given with these perquisites, or with this food,

laundry, and shelter, and they are given also without food, laundry, and shelter. Naturally, when you include food, laundry, and shelter on some of the farms, because it is actually paid for, you have to make them comparable, and include the value of the food, laundry, and shelter on the other farms, if provided.

* * * * * * * * *

Mr. Brossard: We do it in this way, Senator: There is a wage paid for a boy of 15. They will pay him, say, 75 cents a day in the thinning of beets. Where there is such a wage as that, and a farmer has a boy himself 15 years of age doing the same kind of work that the other boy is doing who is paid 75 cents, we allow the farmer's boy 75 cents a day. That is the way that wage is determined for all children where there is a comparable age of that kind.

* * * * * * * * *

Page 948:

"Mr. Brossard: The horse-labor costs in this investigation were ascertained by a separate investigation of the cost of horse labor. At the same time we were in the field getting the cost of production of sugar beets, we had additional blanks, additional schedules made up for the ascertainment of the costs of horse labor, and from a great many of the same farmers from whom we obtained the data on the cost of production of sugar beets, we obtained also the cost of production of horse labor. In that, we got the cost of feed, the cost of labor put on the horse, the cost of shelter, and all other items and then allocated that cost on the basis of the total time the horse was employed, so that all overhead was apportioned.

Chairman Robinson: What would that amount to, by way of illustration, for a horse during the sugar-beet season?

Mr. Brossard: The total time?

Chairman Robinson: No. The total cost for the horse.

Mr. Brossard: Well, it was not allocated on that basis.

Chairman Robinson: How was it allocated?

Mr. Brossard. We took the total time the horse was employed on the farm during the year, and divided the total cost by the total hours employed, the total hours that the horse worked on the place. That gave us the rate per hour.

Chairman Robinson: What was the rate per hour?

Mr. Brossard: The rate per hour in Michigan was 13.2 cents in 1921, 15.4 cents in 1922; 18.2 cents in 1923; 15.4 cents for the three-year average, per hour. That rate included the indirect horse costs and the direct horse costs. The indirect, naturally, were prorated in the hours.

Chairman Robinson: Well, what would be the cost of the use of a horse in growing sugar beets for a season? What I am trying to get at is the practical result of each cost investigation with respect to horse labor. How much would you allow for a season of production for a horse? Fifteen cents an hour if we worked a good many hours, would make a considerable amount?

* * * * * * * * *

Page 949:

"Then we determined the capital charges, which were divided into a charge for the use of land, and the interest at 6 per cent, on the other capital employed in sugar-beet production, such as horses, machinery, etc.

Chairman Robinson: What was the average charge for the use of land in the State of Michigan?

Mr. Brossard: The average charge for the use of land in the State of Michigan was $9.31.

Senator Reed: That is per acre per year?

Mr. Brossard: Per acre per year.

Chairman Robinson: What was it in Utah?

Mr. Brossard: The land charge in Utah was, on an average for the three years, $15.48 and their interest charge $2.31.

Chairman Robinson: How did that charge for the use of land compare with Nebraska or Colorado?

Mr. Brossard: In Colorado land was charged at $14.23, on the average for the three years, for all areas investigated and $1.77 interest at 6 per cent. on their capital.

* * * * * * * * *

Page 950:

"Senator Wadsworth: May I ask, do you count that 6 per cent. interest on the value of the land as part of the expense of raising the crop?

Mr. Brossard: It has been included in all costs as part of the cost of production. Interest has always been included in the Tariff Commission investigations wherever they could establish the value, for this reason, that under Section 315 especially, and where you have higher capital valutions in the United States of the industries in the United States, capital is often substituted for the cheap foreign labor, and if you included all labor costs in the foreign cost of production and you did not include the investment cost in the United States, you would not have comparable costs at all, because they have a low investment cost and we have a higher investment cost. Or vice versa. If we have a high labor cost, they should have a high investment cost. Capital, it is found, in many of these investigations is substituted for labor or labor substituted for capital, which ever is cheaper. Therefore

in order to get comparable costs at all you must include investment costs as well as your labor costs.

Senator Wadsworth: Then what was your gain? If you were not making this investigation for the purpose of ascertaining costs and then comparing those costs with foreign costs, it would be rather unusual to count, as an element of cost in producing a farm product, interest on the investment, because that is income.

* * * * * * * * *

Page 951:

"Senator Reed: I am somewhat surprised that the average interest rate paid is as high as the figures you give. I had supposed that the effect of the joint stock land banks and the Federal farm loan system had been to bring down the interest rate very much.

Mr. Brossard: It has, Senator. I think it has helped greatly; but you must remember, that many of these mortgages were contracted long before legislation providing for the joint stock land bank and the Federal farm loan bank system was enacted, and they are still paying interest rates of 8 to 10 and 12 per cent.—the rates that prevailed immediately after the war—because the Federal farm loan banks refused to let them borrow money, and these farmers had to go and get the money in some other way.

Senator Reed: Is it possible for them now to refund these loans?

Mr. Brossard: If they were not made for so long a time.

Chairman Robinson: Unquestionably the Federal land bank system has had the effect of reducing interest in all the high-interest areas, but it certainly is true that throughout the farming sections of the South there are thousands of loans being made even now, notwithstanding the existence of the Federal

land bank, at rates of interest as high as 7, 8, 9 and 10 per cent. Most of the Southern States—one of them that I have in mind particularly, and with which I am especially familiar—have a maximum interest rate of 10 per cent., and many of the loan companies still are able to make loans which, when analyzed, bear a rate of as high as 9 and 10 per cent., notwithstanding the competition of the Federal land banks. Many of these loans are now being refunded, but new loans are in some instances being made at the higher rates of interest by the loan companies. It is a somewhat anomalous condition, but it exists to my personal knowledge.

* * * * * * * * * *

Page 959:

"Mr. Brossard: In the United States; and what information there was available of a similar character for Canada. We had it charted and put together for this preliminary study, and then the matter was submitted to the advisory board and a report was prepared by the experts in a preliminary way, showing the plans of the investigation as they had drawn them up, calling for an investigation in the field in the United States and Canada. *Areas were selected* in the United States, in the States of Minnesota, North and South Dakota, and Montana, and the prairie Provinces of Canada, because that was the hard spring wheat section.

Of course, we had to decide right then and there the costs of what wheat we were going to compare. *We could not begin to get the costs of all the wheat growers of the United States. That was a total impossibility,* and the problem was with Canadian imported wheat, and the Canadian imported wheat was hard red spring wheat. Then the question arose with the experts of the staff as to whether we should take

in the United States the costs of production of only *hard red spring wheat,* because that was the wheat directly comparable, and which was being substituted for in the milling processes by the Canadian wheat. So the experts of the staff were unanimous. I think, in the agreement that since the *imported wheat* was *hard red spring wheat* that the investigation should be limited to the hard red spring wheat areas of the United States, and, therefore, it was excluded, and the investigation was limited to the four States growing hard red spring wheat and the Prairie Provinces of Canada.

Then we *selected* the *areas* in these four States, and and in the prairie Provinces of Canada, with respect to the type of farming, so that we got a representative farm cost there; and all the conditions of farming in Canada and all the conditions of farming in the United States were included in this cost study. We took sufficient records in each one of these areas to get a *representative* sample, and the *areas* were all blocked out very carefully, showing what the limits of each area were and how many records we were to get in this particular area in order to get a representative sample of that area; and it was squared off and blocked off like that in order to get the total wheat area included, and representative costs."

* * * * * * * * *

Pages 966-7:

Chairman Robinson: I think you did show a very small profit to the sugar-beet grower, notwithstanding a very large allowance made, or what I call a large allowance, for the use of the land. You show a small profit, notwithstanding that. But if you had showed a less allowance for the use of the land it would have resulted in a larger profit to the grower?

Mr. Brossard: Naturally, if the costs are reduced

and you get the same amount for the product, your profits are greater."

* * * * * * * * *

Page 967:

"Chairman Robinson: You allowed rent for the land that was owned by the farmer and upon which he paid no rent?

Mr. Brossard: Yes, sir; the same as we had charged interest on investment.

Chairman Robinson: You proceeded on the theory that it was proper to allow interest on the investment, and that it was approximately accurate to take the rental of the land owned by the farmer and charge that into the cost of production?

Mr. Brossard: Yes, Senator. We did that because of our general theory that for tariff purposes and for purposes of comparison of costs in one country with costs in another, to exclude the item of interest or to exclude the item of rental of land would be totally unsound from the point of view of the *economic comparison or statistical comparison.* It could not be made, really. The same thing was done in wheat; the same thing was done in every other investigation we have made."

* * * * * * * * *

Page 970:

"Suppose, for example, you wanted to use the original cost of land, and we go to, say, Wisconsin, and we got a piece of land 50 years ago and we bought it at $2.25 an acre, or take it a hundred years ago, which may be a little more real at that price; and we stay on that land three generations of the same family, it never changes hands. The present valuation of that land, then, for costs purposes is still $2.25 an acre. But John Jones, right across the road from

this farm buys a farm in 1926, and he pays $225 an acre for his land. The original cost in the one case is $2.25 an acre, plus what additional has been expended on it for improvements which would be very small in that time, it could not be very much in that time; and on the other hand there would be $225.

Now, who is there that will argue that those two costs, one across the street from the other, can be compared for this purpose? Put one of those farms on one side of the ocean and the other one on the other side of the ocean, and you have something like the situation."

* * * * * * * * *

"Chairman Robinson: Your position, then, as I understand it, is that the present value of the land, or at least its present rental value, must be or should be included in the costs of production, even though the land is owned by the farmer who operates it?"

* * * * * * * * *

Pages 971-2:

"Chairman Robinson: Do you mean to say that there is a variation in the cost of production of sugar beets in the United States as much as 800 per cent., or approximately that?

Mr. Brossard: That is apparently correct, Senator; which is not unusual at all for a big industry of this kind."

* * * * * * * * *

Page 972:

"Chairman Robinson: For comparison purposes, did you undertake to work out what would be the cost of production of sugar beets taking the bulk line system?

Mr. Brossard: We did not, Senator.

Chairman Robinson: Have you any idea as to how it would have compared with the results which you actually obtained by taking the weighted average?

Mr. Brossard: I do not know how it would have compared; but I think, Senator, according to our theory of the situation, if we had ascertained *representative* costs for a *sufficient* number of farms in both the United States and abroad, so that our curve could be a perfect curve, that there would be very little, if any, difference between the comparison on the basis of the bulk line cost and the comparison *on the basis of the average cost of production.*

Chairman Robinson: Do you have that information?

Mr. Brossard: I have never tried it, as I said before.

Chairman Robinson: You have never tried it?

Mr. Brossard: I have not tried it on this sugar-beet data.

Chairman Robinson: Which, in your opinion, is the correct method, the weighted average or the bulk line?"

* * * * * * * * *

"Mr. Brossard: Well, there are advantages and disadvantages to both methods. May I explain what I think the differences are?

Chairman Robinson: Yes. If you do not mind, I would like for you to say directly what you think is the better method from the standpoint of an economist, the weighted average or the bulk line, and then you can make any explanation you choose to; and I would be glad to have you make your explanation justify your viewpoint.

Mr. Brossard: Yes, sir. *If we could get* in our investigations *actual* bulk-line costs, then I would say that we should compare the bulk-line for measurement, and I think it would not be very much different

from the result with your average costs of production, Senator. But our difficulty with that method is this: That we have in many of our industries two or three or four, or sometimes one plant. Of course, where there is only one plant you have to take that plant's cost—bulk-line, average, or no matter what—and if there are three or four plants only, then there usually is an outstanding difference; it may not be an outstanding difference in cost for two plants, but there may be an outstanding difference in cost between any of these particular individual plants, and you can not distinguish the cost of production of the several units of the products produced within the single individual plant. The bulk-line method *assumes* that we get a perfect curve.

Now, bulk-line was used by Dr. Taussig and others in *price fixing,* and they could use one of two methods in determining their bulk-line. They could use the *arbitrary* method which Dr. Taussig has explained they did use in some cases as the cut and dried method. That is, they were interested in maintaining production, and so the question with them was to fix a price which would maintain production; and so he *chose* a figure which represented the bulk-line cost. It is the same idea as is included in the representative or marginal cost. If you get the cost of the higher cost producers that will just produce at the price you fix, and you can maintain your production if you desire by offering that price, why, then you have a representative cost, you have a bulk-line cost, and you have also what is termed a 'marginal cost.'

* * * * * * * * *

Chairman Robinson: Explain how the weighted average in any given case is ascertained.

Mr. Brossard: The weighted average—I will take a simple case first.

Chairman Robinson: Yes.

Mr. Brossard: The weighted average, we will say, of the production of a single plant is obtained by taking the total cost of production and dividing by the total output. That gives you a unit cost.

Now, let us elaborate that a little bit. Suppose we have two plants and we have one plant here producing, say, 10 tons, and another plant over here producing 20 tons. To get a weighted average cost of those two plants, we would take the 10 tons, add it to the 20 tons, and that would give us 30 tons, and we would take the cost of this plant and add it to the cost of the second plant, and we would divide the total cost of the 2 plants by the total production of the 2 plants, which would give us a weighted average cost.

You can elaborate that with three plants or as many as are in the classification. *Sometimes we did not have the total amount of the individual plants.* We have the total product, say, of—I will use a sugar-beet illustration—in sugar beets we chose *representative areas,* we had costs in those *representative areas,* but *we did not have a total cost for the whole area.*

Suppose an area represented 500,000 tons, and we had costs for 200,000 tons or 300,000 tons. We *assumed* that our *costs* for the *two or three hundred thousand tons was representative of the 500,000 tons in that area,* and when we combined that area with another area, we weighted the cost in this individual area not by the two or three hundred thousand tons, but by the 500,000 tons.

Senator Reed: You assumed that the unknown plants produced at the same cost as the known plants?

Mr. Brossard: We *assumed* that we had *representative costs of production in this area. If we had not assumed that, Senator Reed, our investigations would be hopeless. We would have to assume it.* We

used the same method, we weighted the total cost per unit here in this area by the total production here, and the other area by the total production there, and in our 24 areas we had weighted average costs of the production of sugar beets as the total costs.

Chairman Robinson: Explain how the bulk line in your opinion would be applied in a given case. You may take any case which you desire to illustrate.

Mr. Brossard: Well, I will take the case where it was applied. Some of the commmissioners applied it in the wheat report.

Chairman Robinson: You did not study the wheat case.

Mr. Brossard: Yes.

Chairman Robinson: I asked you something about that the other day.

Mr. Brossard: Yes.

Chairman Robinson: In that case, which did you think was the better system to apply?

Mr. Brossard: Well, I never made up my mind about until right now. If you want me to answer what I think about it, I will do so.

Chairman Robinson: That is what I asked you. I could not ask you anything else.

Mr. Brossard: I was thinking you mean what had I determined after a study of this at the time the investigation was made, and I had not then made up my mind. I think I should have used the weighted average cost in this case.

Chairman Robinson: What advantages had that in the wheat case over the bulk line?

Mr. Brossard: Where you have the costs of products in which it is difficult to determine a bulk line cost, one definite point which you can call the bulk line, a weighted average is something that you can get and it is simple and it is mathematical. *It may cover up, however, and I think it does in nearly all of*

our investigations, some of the very significant facts, which may not ever be shown. There is no method I know of to overcome the buying of significant facts in weighted averages.

Senator Reed: May I interrupt you? In all this talk about the bulk line, I still have not a clear idea of what is meant. Is it the line of cost under which 51 per cent. of the product is manufactured?

Mr. Brossard: No, Senator. The bulk line has been variously defined, and it has been used in differ ent ways. The bulk line merely, in plain English, is that point at which the bulk of the industry is produced.

Senator Reed: I understand that.

Mr. Brossard: And that would mean perhaps 85 per cent. of the industry.

Senator Reed: Might it? How do you figure the bulk line?

Mr. Brossard: The way the technicians figure it is that it is that point on the curve at which the break in the curve becomes extreme and your costs of production rise rapidly. Usually that is some place beyond the average cost, considerably above the average cost in the ordinary curve.

Senator Reed: Isn't that a very vague measure?

Mr. Brossard: In some cases it certainly is.

Senator Reed: It is still vague in my mind.

Mr. Brossard: *Well, I think it is a difficult thing.* One advantage the average has is that everybody has been working with it *and we have all made averages, and the disadvantage of the bulk line is that it is a new thing that has been created and we have been trying to work with it as economists, and it is an instrument that has been worked with to overcome some of the inherent difficulties of the average. You see, when you get an average you take things which are sometimes not at all alike and the costs vary so*

greatly from lowest to highest that you simply hide up in the average all the significant facts in the industry.

Chairman Robinson: Suppose it were desired to do that, to make the facts found conceal the true facts in the industry. I am not applying this now to any particular case—which one would be employed the bulk line or the weighted average? Which, I mean, could be most easily employed?

Mr. Brossard: Well, I will tell you. *I think the average covers more sins than the bulk line,* because Senator, in order to get a bulk line you have to array your costs—you understand what I mean by array your costs—and that shows your high cost and your low cost and where your breaks are, and if you have a complete and connected and perfect curve then the mathematician could apply his formula and cut the thing at the bulk line where the curve becomes the greatest, and you would have a very accurate and actual representation of the situation.

Chairman Robinson: Honestly and impartially applied, which would approach nearer scientific accuracy, the bulk line or the weighted average?

Mr. Brossard: Do you mean if I had to apply them in all cases or in particular cases? I would make a selection, I think, in different cases, depending upon my statistical data.

Chairman Robinson: You think you would employ the bulk line in some cases, and the weighted average in others?

Page 976:

Mr. Brossard: I am speaking purely as a statistician. I think that some data are so dissimilar that to average them at all and use either a weighted average or a simple average of the data would be too statistically fallacious to be of any use at all.

APPENDIX L.

"A TARIFF COMMISSION AT WORK." Articles by Dr. W. H. Wynne, Williamstown, Mass., in the "Journal of the Canadian Bankers' Association", January and July, 1926, Vol. XXXIII, Nos. 2 and 4, respectively.

Page 196 (January):

> "The difficulties in the way of ascertaining costs of production are considerably greater for specialties than for standard articles, and virtually insuperable where a given set of processes turns out, not a single commodity, but two or more, Mutton and wool; beef, hides, and horn; cotton fibre and cotton seed; a main article of manufacture and its by-products—these are examples of such joint products; and no cost accountant, however skilled and ingenious, can on other than an arbitrary basis, determine for each of these jointly produced commodities its specific cost of production."

Page 421 (July):

> "Determination of the margin between domestic and foreign costs of production, is not a simple, quasi-mechanical matter. On the contrary, as I have already pointed out, the task bristles with practical difficulties. It calls, moreover, for the exercise of *judgment* in the selection of facts, and necessitates a choice among *alternative* bases of comparison, for as different portions of the supply of a commodity are not produced at the same cost, the question arises—which of these varying cost figures shall be chosen for the purpose of estimating the equalizing duty? Scientific considerations point in many cases to *no* clear, unmistakable conclusion, so that there is room, therefore, for the play of personal opinion, bias, preju-

dice. Frequently two (or even more) differential cost figures may emerge, each of which may be defended on plausible grounds. The ardent protectionist may be expected to prefer the higher one, the free trader the lower. This being so, the administration that supports heavy duties will be tempted to appoint to the Board men with high protectionist views, while an administration that is partial to low tariffs will feel disposed to select men with free trade leanings."

Page 423:

"Another very significant fact is that in only eight out of the nineteen reports have the Comissioners been unanimous. In all the rest they have disagreed as to the cost facts, the application of those facts, or both, and have presented divided reports. The main questions over which disagreements have arisen may be reduced to three and stated as follows:

1. Should the cost of transportation to the United States be included as part of the foreign cost of production?

2. What periods should be selected as the basis for comparison—a single year, or a longer period?

3. Should the costs compared be average costs, or bulk-line costs, i. e., the cost at or below which the bulk of the supply of a commodity is produced."

Page 425:

"3. The wheat and butter cases will also serve to illustrate the nature of the third and last of the main points of disagreement among the Commissioners. The choice of different basic periods does not explain the whole of the wide margin between 70 cents—the difference in the cost of producing a bushel of wheat in the United States and Canada determined by one

group of Commissioners, and 42 cents—the difference worked out by the other group. Part of the spread is attributable to the fact that the former excluded costs of transportation and compared bulk-line costs, while the latter allowed for carrying charges and used weighted averages. Clearly it is difficult to establish any definite mathematical rule as to what percentage of the output of a commodity is to be regarded as the 'bulk' of production. The bulk-line may be drawn, therefore, through various points on the cost curve, so that this method of determining costs, whatever its merits, 'invites a wide range of administrative discretion.' It is rarely likely to be applied to yield the same results as averaging, and it is in part due to the use of these alternative methods that the difference in the domestic and Canadian costs of producing wheat was found to be on the one hand as high as 70 cents and on the other only 42 cents.

In the butter investigation also, there was a cleavage in the Commission as to the proper method of ascertaining and comparing costs. Commissioners Dennis and Costigan (the present 'minority' members of the Board, and the chief witnesses attacking it before the Senate Committee) assert that in determining American costs the majority members included a group of high cost producers and excluded a large body of low cost producers, with the consequences that they obtained for the United States a cost figure substantially higher than the one which represents a fair basis of comparison with Danish costs. Applying this method of computation to the Statistics of 1923, the majority members recommended an increase in the butter duty from 8 cents to 12 cents a pound, i. e., the full 50 per cent allowed by law. The minority members, on the other hand, contended that the facts warranted no increase whatever."

APPENDIX M.

Quotation from speech of the Hon. Thomas J. Walsh, in the United States Senate, May 8, 1922:

> "The principle is older than American constitutional law and not peculiar to our institutions, having been announced by Locke in his work on Civil Government thus:
>
> 'The legislature neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have' (Locke on Civil Government, sec. 142).
>
> *It is peculiarly applicable to the taxing power,* the struggle to keep it unimpaired in the hands of the elected representatives of the people, as *against attempts to exercise it by or to transfer it to the Executive being, as is well known, intimately associated with the development of English liberty.* The *jealousy* touching the *exercise of the taxing power* engendered by that historic struggle is reflected *in that provision* of the Constitution which requires that all *bills for raising revenue* shall originate in the *House of Representatives.*
>
> * * * * * * * *
>
> So *essential* is the future of redress in the *courts in case of arbitrary action,* that provision is ordinarily made in the statutes conferring such powers upon commissions for a review of its action by some judicial tribunal. The *interstate* commerce act, the *Federal Trade Commission act, and the stockyards act are familiar examples.*
>
> * * * * * * * *
>
> But the *action* of the President in establishing rates of duty under the system proposed by the amendment *is not subject to review, however unreasonable and oppressive they may be,* assuming that they are within

the 50 per cent limit imposed by the law. It is in the nature of the taxing power that, being exercised within constitutional or statutory bounds, it is not open to judicial review, being political in character.

* * * * * * * *

It is agreed on all hands that to justify a delegation of power which might properly be exercised directly by the legislature, it is essential that the law lay down a clear rule for the guidance of the executive officer to which he must adhere in whatever action he may take. As expressed by Willoughby, '*the facts* which are to determine the executive acts' must be 'such as may be *precisely* stated by the legislature and *certainly* ascertained by the executive.' The principle is peculiarly applicable in connection with the fixing of rates by the administrative agency.

* * * * * * * *

But our differences do not end here. Let it be assumed that the *cost of transportation* within the country must be taken into consideration, a conclusion which the language of the amendments makes all but inescapable. To what point and from what point is it to be calculated—from Butte, Montana, to Duluth, Minn., or from Redding, California, to Pittsburgh, Pa., or from Little Rock, Ark., to Birmingham, Ala.? If the problem were presented to Congress—*if it deemed it wise to entertain the idea—the solution would be relatively simple, as that body may exercise an unrestricted discretion in the matter.* It is not *obliged to be logical.* It might strike a happy medium or make an arbitrary allowance for that element. But the President, having no legislative authority save the power of veto, functioning under a delegation, must proceed according to the rule laid down by Congress.

Nor are we out of the woods yet. If the rule under which he is to act were that heretofore said to be popularly entertained—namely, *the difference in the*

cost of production at home and abroad—he would be confronted with the indisputable fact that such costs vary through a wide range as between foreign countries seeking our markets and as between individual producers both at home and abroad. It is quite generally believed, and doubtless with some foundation, that at present production costs in Germany are extremely low, much lower than in Britain or other countries of Europe competing with her in our markets. What country would furnish the standard upon which the computation of the President would be based? *Or would the true standard be the cost to the most efficient and economical producer of any country, shutting all others out and giving him a monopoly of trade with our country? And, on the other hand, what American producer would provide the standard, the one who is favorably situated with reference to most of the elements entering into his costs, commanding his own supply of raw materials in proximity to his plant, operating under perfect business management with ample credit, or the individual with an antiquated plant, pursuing archaic business methods, and hampered by limited means, or would the computation of the President be based on average costs?*

* * * * * * * *

Bear in mind he must take into consideration the *difference in the prices;* he must take into consideration the difference in the cost of producing it here and abroad, including wages, cost of raw materials, and so on; and then he must take into consideration *any other advantage which the foreigner may have over the domestic producer, including such as arise from laws, regulations, and so forth."* (Italics ours.)

(Note: "any other advantages or disadvantages in competition" remaining in sub-section c.)

* * * * * * * *

"In the ante bellum, pre-Volstead days German beer had a large sale in Milwaukee, largely on senti-

mental grounds, and many articles of foreign manufacture command a premium here merely because they are imported or because they have a reputation extending through many years. This is particularly true of women's garments and of dress goods generally, if not of all fabrics. All such considerations must be given due weight, either under the general rule or the specific direction quoted above. But it is indisputable that an *impossible task is imposed upon the President* when he is called upon to *reduce such influence to dollars and cents as to any specific item and to fix the rate of duty so as that the 'differences in condition of competition'* having in mind such factors shall be equalized. It will bear repetition that whatever allowance he may make for any of these imponderables that may be present, and any allowance must, in the nature of things, *be no more than a guess his action is final, subject to review by no power, judicial or otherwise."*

* * * * * * * *

"This leads me to remark that the committee, apparently doubtful of the validity of the amendments under review, considered solely as features of a revenue law, took pains to recite in them that they are to be enacted 'in order to regulate the foreign commerce of the United States.' *But it need not be said that Congress can not delegate the authority reposed in it by the people to regulate commerce with foreign nations any more than it can the power to lay and collect duties."* (Italics ours.)

(NOTE.—"Any other advantages or disadvantages in competition" remaining in sub-section c, is the same as the "differences in condition of competition in trade" originally in the bill as introduced into the Senate and referred to by Senator Walsh.)

APPENDIX N.

On January 12, 1928, Congressional Record, Vol. 69, page 1428, Senator Wm. E. Borah said:

"My second objection to the present tariff law was and is because of what is known as the flexible-tariff provisions of the law. If those provisions of the present tariff law are not in contravention to the Constitution of the United States, then I have studied that instrument and our whole theory of government in vain. I think it is a wrong principle. If there was anything about which our fathers were primarily concerned, it was to keep wide apart the sword and the purse and not permit them to be in any sense under the control of the same individual. We have gone a long way, Mr. President, toward giving to the Commander in Chief of the Army and Navy of the United States the power to control the revenues of the Government. It is not a conclusive step, but it is an important step; and, in so far as it is a step at all, it is a vicious one. I feel that the President, the chief executive officer of the Government, regardless of who he may be or what party he may represent, should have no power or authority with reference to fixing tariff duties upon imported articles, save such as is given him in his authority to sign or veto measures passed by the Congress.

If we can give to the President of the United States the power to increase or decrease rates of duty to the extent of 50 per cent, we can give him the power by the same authority to increase or decrease them 100 per cent, and we can place in the hands of the Chief Executive what, in my judgment, is a sufficient control of the revenues of the Nation to make that control effective as to the amount of revenue which shall be collected.

Mr. Caraway: Mr. President, may I ask the Senator a question?

Mr. Borah: Certainly.

Mr. Caraway: If the President may change the rates of tariff duty, he may likewise change the rates of taxation on incomes or anything of that kind, may he not?

Mr. Borah: I should think that the same authority, if it could be found anywhere in the Constitution, which would authorize him to do the one could authorize him to do the other.

It is true, Mr. President, that the Supreme Court of the United States in what is known as the Field case went a long distance in justifying the delegation of what seems to me legislative power; it certainly went further than most members of the profession anticipated it would go before the decision had been rendered; but in that case the court clearly intimated it had gone the full distance. In this matter, however, we have gone an arrow's flight beyond the point which was held constitutional by the Supreme Court in the Field case. It is not only wrong as a constitutional principle, but it is undesirable in practice."

APPENDIX O.

Underwood and Reed of Missouri warned the Senate that differences in cost of production at home and abroad could not be accurately ascertained and consequently the flexible provision conveyed to the President a legislative discretion.

On August 19, 1922, Congressional Record, Volume 62, Part Eleven, page 11598, after the *"cost difference"* had been adopted Senator Underwood of Alabama spoke in opposition to Section 315, he said:

Mr. President, I discussed this feature of the bill some days ago, and I did not intend to say anything further this morning; but I am not going to allow the vote to come after the statement which has just been made by the Senator from Wisconsin without challenging it from my viewpoint.

The Senator from Wisconsin has stated that this bill does not confer the power of taxation on the President, for, he says, the Tariff Commission is to ascertain the cost of production here and abroad, and the President must fix the rate to measure the difference in the cost of production. Theoretically that may be a statement of the case, but, practically speaking, it leaves the President without any great limitations on his power, with the absolute power to fix the rates of taxation within his own discretion, within the limitation, of course, that he can not increase or decrease rates more than 50 per cent of those which are contained in the bill.

In the first place, the Tariff Commission is authorized to investigate and report the facts to the President, but there is nohing in the proposed legislation that confines the President of the United States, in determining what shall be done, to the facts reported by the commission; in fact, it has been stated on the floor—and I think possibly it was the Senator from Wisconsin who made the statement—that the President not only could consult the Tariff Commission but he could consult many other boards of the Government. Indeed, he may consult anybody he desires. When this question comes within the chambers of the Executive office, he may consult the men who are interested in the business; he may consult the manufacturers, or he may consult the importers who desire the rates reduced. On their conclusions, he may fix the tax. However, it is idle to say, when so great a range of difference in the cost of production

here and abroad exists, that the discretion of fixing the tax does not rest in the mind of the Executive.

Mr. President, I sat on the Ways and Means Committee of the House of Representatives for many years; and I have heard the best business men in the country discuss these very details; men who were honest; men who, possibly, were prejudiced in favor of their own business but who were absolutely honest; and yet I have heard these same men time and time again vary over 100 per cent in their estimates as to the difference in the cost of production on a particular article. That is necessarily the case.

Take the pig-iron business. I think the cost of production here in the best furnaces and the cost of production abroad in the best furnaces is about equal; but there is no limitation made in this proposed legislation as to what basis the President shall take in determining the difference in the cost. If he is to take the weaker furnaces, the dilapidated furnaces, in the United States, those furnaces which can only run when the prices of the commodity are pyramided and on extraordinary occasions, and then, on the other hand, go to the foreign market and take the best, the newest, and the most efficient furnaces and make the comparison from the standpoint of our weak industrial children with the strongest and most virile industrial children abroad, of course, he would find a great difference in the cost of production. So that in the end the real basis of fixing these taxes without limitation except that they shall not be raised or decreased more than 50 per cent of the rates provided in the bill, lies in the hands of the President of the United States to exercise as he sees fit.

On the same day Senator Reed of Missouri also said:

Mr. President, not only is it true, as was stated by the Senator from Alabama (Mr. Underwood), that

it is impossible to ascertain differences in cost of production between the mills of our own country, but it even more difficult to ascertain the difference in cost of production in the mills abroad. It follows that these differences which exist between the plants of the various countries can not be reconciled under any rule laid down in the bill. Are we to take the highest cost of production or the lowest cost, or are we to take the average cost? If we take the highest cost of production here and the lowest cost of production in Europe, we will arrive at one result; if we take the lowest cost of production here and the highest cost of production abroad, we will arrive at an entirely different result. If we take the highest cost of production here as the basis of comparison, then our people will be taxed for the benefit of the poorest mill in the United States, and our efficient mills will be granted protection far beyond their needs. If we take the difference between the average cost of production here and the average cost of production there, then the purposes of the bill as proclaimed by its advocates will fail as to all those American manufactures which are above the average line in production costs.

So that, Mr. President, we have set up an impossible rule, an impossible task. Moreover, the difference between the cost of production in one foreign country and the cost of production in another foreign country multiplies the difficulties I have referred to and created a labyrinth through which human intelligence can not find its way.

It has been claimed here that Germany produces much more cheaply than England. If that is true, how is the rule of the bill to be applied? Shall we apply it so that it will fix a special duty upon articles made in Germany? If we do that, we violate our trade treaties with that country. If we avoid violat-

ing our trade obligations under our treaties, then we at once are compelled to take the German standard, and in that case the tariff might be absolutely prohibitive as to the English mill. So that we set up an impossible task, an insoluble task, and we say that when that task is accomplished the President may act.

Mr. President, boiled down, all this bill means is that the President may do whatever he wants to do, or else he can do nothing.

APPENDIX P.

SMITH & HULSE
GENERAL SHORTHAND REPORTING
1742 K Street Northwest
Washington, D. C.

Personally appeared before me, ~~a Notary Public in and for the District of Columbia,~~ B. W. DeLoss, who, being first duly sworn, deposes and says that the following is a true transcript of a portion of his shorthand notes taken in reporting oral argument before the Supreme Court of the United States on March 3rd and 4th, 1927, in The United States of America, ex rel. Norwegian Nitrogen Products, Inc., Plaintiff-in-Error v. The United States Tariff Commission, Thomas C. Marvin, William S. Culbertson, et al., Defendants-in-Error, No. 91.

"Justice VanDeventer: How is it exactly the same? That is only a question here as to the rule that is to be applied—the law; while in case of the appraisement, the rule is the same, the law continues the same, it is a mere ascertainment of whether or not the particular importation is in point of fact within one rule or within another. But here, as I gather from what has been said, the rule is to be applied—

the law is the change and therefore the one was in force as to the matter of applying rates of duty while the other is the matter of making the rule or altering the existing rule to be applied.

"Mr. DeVries: I think your Honor will find on reflection these cases are identical, with this difference, that the finding of the appraiser determines the duty to be laid in the individual case while the finding of the President, assisted by the Tariff Commission, is the determination by the ascertainment of the state of facts—the same state of facts—as to the cost of production which shall be applied to a number of importations.

"Justice McReynolds: The difference between the trying of the case and the making of a law?

"Mr. DeVries: No, each is delegated a power to find the same state of facts which shall determine the question of duty to be laid in the one case upon one importation, in the other case upon a series of importations."

B. W. DELOSS.

Sworn and subscribed to before me this
5th day of December, 1927.

ROBERT L. LEHNERT.

(Seal)

INDEX

	Page
Opinions of the courts below	1
Jurisdiction	1
The question	2
The statute	2
Statement	4
Summary of argument	4
Argument	5
Conclusion	14

CITATIONS

Cases:	
Auffmordt v. *Hedden*, 137 U. S. 310	13
Brig Aurora, 7 Cranch (11 U. S.), 382	5, 6
Buttfield v. *Stranahan*, 192 U. S. 470	5, 6, 10
Field v. *Clark*, 143 U. S. 649	5, 6, 7
Franklin Sugar Refining Co. v. *United States*, 178 Fed. 743	11
Hannibal Bridge Co. v. *United States*, 221 U. S. 194	6
Hilton v. *Merritt*, 110 U. S. 97	13
Muser v. *Magone*, 155 U. S. 240	12
Nicholas & Co. v. *United States*, 249 U. S. 34	11
Passavant v. *United States*, 148 U. S. 214	13
Stairs v. *Peaslee*, 18 How. (59 U. S.), 521	13
Union Bridge Co. v. *United States*, 204 U. S. 364	6, 10
United States v. *Chemical Foundation, Inc.*, 272 U. S. 1	5, 6
United States v. *Lippmann, Spier & Hahn*, 260 U. S. 742	2
United States v. *Stone & Downer Co.*, No. 150, October term, 1926, decided May 16, 1927	13
Wayman v. *Southard*, 10 Wheat. (23 U. S.), 1	5
Statutes, etc.:	
Act of June 26, 1884, c. 121, Sec. 14, 23 Stat. 53, 57	11, 12
Act of Oct. 1, 1890, c. 1244, Sec. 3, 26 Stat. 567, 612	8, 10, 11
Act of July 26, 1892, c. 248, Sec. 1, 27 Stat. 267	11
Act of July 24, 1897, c. 11, Sec. 5, 30 Stat. 151, 205	11, 13
Act of Aug. 5, 1909, c. 6, Sec. 6, 36 Stat. 11, 85	11, 13
Act of Oct. 3, 1913, c. 16, Sec. IV, Par. E, 38 Stat. 114, 193	11
Act of Aug. 22, 1914, c. 267, 38 Stat. 703	2
Act of May 27, 1921, c. 14, 42 Stat. 9	13
Act of Sept. 21, 1922 (Tariff Act of 1922), c. 356, 42 Stat. 858:	
Sec. 303, Title III	11, 13
Sec. 315, Title III	2
Par. 12, Title I	4, 6
Act of Feb. 13, 1925, c. 229, Sec. 8(a), 43 Stat. 936, 940	2
Revised Statutes, Secs. 2502, 4219, 4228	11
Judicial Code, Sec. 195	2
Constitution of the United States, Art. I, Secs. 1 and 8	4, 5, 8

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 1115

J. W. HAMPTON, JR., & CO., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS OF THE COURTS BELOW

The opinions of the courts below are reported as follows:

The opinion of the United States Court of Customs Appeals, T. D. 42030, 51 Treas. Dec. ____. (R. 77–101.)

The opinion of the Board of United States General Appraisers (now United States Customs Court), T. D. 41478, 49 Treas. Dec. 593. (R. 12–74.)

JURISDICTION

The judgment of the Court of Customs Appeals was entered February 24, 1927. (R. 102.) Its

mandate was issued March 26, 1927. (R. 102.) The petition for certiorari was filed May 10, 1927. The jurisdiction of this Court to issue a writ of certiorari to review a judgment of the Court of Customs Appeals is conferred by Section 195 of the Judicial Code, as amended by the Act of August 22, 1914, c. 267, 38 Stat. 703, but as limited by Section 8 (a) of the Act of February 13, 1925. *United States* v. *Lippmann, Spier & Hahn,* 260 U. S. 742. The Attorney General filed a certificate of importance October 16, 1926. (R. 76.) The Act of August 22, 1914, prescribes a limit of sixty days after the mandate issues within which to apply for certiorari. Section 8 (a) of the Act of February 13, 1925, prescribes a limitation of three months from the date of the judgment. Both limitations apply as the Act of 1925 did not enlarge any period of limitation prescribed by other statutes. In this case the petition was filed in time under both statutes.

THE QUESTION

The question presented is whether the flexible tariff provisions in the Tariff Act of 1922, giving to the President power to vary tariffs to meet differences ascertained by him in costs of production at home and abroad are unconstitutional as a delegation of legislative authority.

THE STATUTE

Section 315 (a) of the Tariff Act of 1922 (c. 356, 42 Stat. 858, 941), is as follows:

That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

STATEMENT

An importation of barium dioxide was entered for duty at 4 cents per pound, the rate set forth in Paragraph 12, Title I, of the Tariff Act of 1922 (c. 356, 42 Stat. 858, 860). The Collector of Customs, however, levied duty at the rate of 6 cents per pound by virtue of a proclamation of the President reported in T. D. 40216 (45 Treas. Dec. 669), and set forth in the Record at pages 79, 80. This proclamation was issued in accordance with the provisions of Section 315, Title III, of said Act, which are quoted in full in the petition (pp. 4–9).

The petitioner challenges the constitutionality of the provisions of said Section 315, alleging that Congress in enacting the statute delegated to the Executive Department the power to legislate in derogation of Section 1 of Article I of the Constitution of the United States, which provides that:

> All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

The trial court, one member dissenting, upheld the constitutionality of the Act in question (R. 12–74), and on review the Court of Customs Appeals, in a unanimous opinion, affirmed the lower court (R. 77–102).

SUMMARY OF ARGUMENT

The legislative and judicial history of the times since the case of the *Brig Aurora*, 7 Cranch (11

U. S.) 382, and *Wayman* v. *Southard,* 10 Wheat. (23 U. S.) 1, reviewed in *Field* v. *Clark,* 143 U. S. 649, *Buttfield* v. *Stranahan,* 192 U. S. 470, and numerous later decisions of this Court down to and including *United States* v. *Chemical Foundation, Inc.,* 272 U. S. 1, contain elaborate and exhaustive opinions explaining and defining the principle of delegated power in related statutes. From an examination of those cases it would seem that the question presented in the case at bar is not an open one in this Court.

Section 315 does not delegate to the President the power to tax. What the President is required to do is simply in execution of the Act of Congress. He is merely the agent of the lawmaking department to ascertain the facts prescribed by Congress and declare the event upon which its expressed will is to take effect. The statute invests the President with no discretion or judgment in proclaiming a duty, but authorizes him to proclaim only the duty shown by a prescribed "state of things" or as shown by ascertained "facts" legislatively prescribed. *Field* v. *Clark, supra.*

Section 315 is not an invasion of the "general welfare" clause of Section 8 of Article I of the Constitution; neither is its constitutionality imperiled because, as alleged in the petition (p. 10), action under it is not subject to judicial review.

ARGUMENT

In *Field* v. *Clark,* 143 U. S. 649, decided in 1892, this Court gave a learned and exhaustive review of

the legislative and judicial history of the principle of delegated power beginning with the case of the *Brig Aurora,* 7 Cranch (11 U. S.) 382, decided in 1813, and the doctrine announced in *Field* v. *Clark* has been cited with approval and followed in numerous cases down to and including *United States* v. *Chemical Foundation, Inc.,* 272 U. S. 1, decided in 1926.

See:

Buttfield v. *Stranahan,* 192 U. S. 470;
Union Bridge Co. v. *United States,* 204 U. S. 364; and
Hannibal Bridge Co. v. *United States,* 221 U. S. 194.

In the light of these authorities, the case does not present a constitutional question differing in principle from that already decided several times by this Court.

Section 315 does not delegate to the President the power to tax, as alleged by petitioner; it levies a tax in terms of a "state of things" or "facts," namely, the difference in cost of production in the United States and the principal competing foreign country, and merely delegates to the President the power to ascertain and proclaim that difference. We quote from *Field* v. *Clark, supra,* at page 693, 694:

> "The true distinction," as Judge Ranney speaking for the Supreme Court of Ohio has well said, "is between the delegation of power to make the law, which necessarily

involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *Cincinnati, Wilmington &c Railroad* v. *Commissioners,* 1 Ohio St. 88. In *Moers* v. *City of Reading,* 21 Penn. St. 188, 202, the language of the court was: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law." So, in *Locke's Appeal,* 72 Penn. St. 491, 498: "To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know." The proper distinction the court said was this: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making

power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation.

In the case at bar the President has acted strictly within the rule above announced and, upon a finding of fact as to the difference in cost of production at home and abroad of a given commodity, a rate of duty, measured by the difference in cost of production so found, has been imposed in accordance with the expressed will of Congress as declared in Section 315.

In *Field* v. *Clark, supra,* the appellant claimed that Section 3 of the Tariff Act of October 1, 1890, c. 1244, 26 Stat. 567, 612, was unconstitutional and void, in that it delegated to the President the power of laying taxes and duties, which power by Sections 1 and 8 of Article I of the Constitution is vested in Congress. Said Section 3 provided as follows:

> That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, * * * *whenever, and so often as the President shall be satisfied* that the Government of any country producing and exporting sugars, molasses, coffee, tea, and hides, * * * *imposes duties or other exactions upon the agricultural or other products of the United States,* which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States *he may deem to be reciprocally unequal and unreasonable,* he shall have the power and it shall be his duty to suspend, by

> proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, *for such time as he shall deem just,* and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country as follows, namely: (Here follows an enumeration of such articles and the prescribed duties.) (Italics ours.)

Viewed with reference to what delegation of authority was upheld in that case, it is significant to note that the facts, conditions of trade, or "state of things," by comparison of which the President was to determine "reciprocal equality and reasonableness," were the effects upon our trade of the tariff laws not only of the United States but of foreign countries. He was to investigate and determine the effect of foreign tariffs upon the exports of our agricultural and other products to foreign countries and the effect of our tariff granting free entry to imports of certain articles imported from such countries, balance and measure these resulting trade conditions one with the other, and if he "deemed" the relative trade conditions so resulting "reciprocally unequal and unreasonable," so proclaim, suspend our tariff laws, and put into effect certain rates of duty by Congress prescribed, which in turn he might also suspend "for such time as he may deem just."

There is no difference in principle between Section 3 of the Act of 1890, *supra*, and Section 315 of the Act of 1922, *supra*. In the former Act the Congress prescribed the substitute rates in terms of fixed figures; in the latter the Congress has prescribed the substitute rates in terms of prescribed "facts" or "state of things."

Congress by Section 315 fixed the primary standard by which rates of duty might be raised or lowered and the statute devolved upon the President the mere executive duty to effectuate the legislative policy declared in the statute.

Buttfield v. *Stranahan*, 192 U. S. 470.

To quote the language of this Court in *Union Bridge Co.* v. *United States*, 204 U. S. 364, at 387:

> Indeed, it is not too much to say that a denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be "to stop the wheels of government" and bring about confusion, if not paralysis, in the conduct of the public business.

In answer to the allegation of petitioner (Pet., p. 9) that never in our history has the power been given to a delegee to fix, change, and amend a rate of duty, much less the entire dutiable schedule of the Tariff Act, reference is made to the following statutes imposing duties on tonnage:

Revised Statutes, Secs. 2502, 4219, 4228;

Act of July 26, 1892, c. 248, Sec. 1, 27 Stat. 267; and

Act of June 26, 1884, c. 121, Sec. 14, 23 Stat. 53, 57;

and statutes providing for countervailing duties, bounties, etc.:

Act of Oct. 1, 1890, c. 1244, Sec. 3, 26 Stat. 567;

Act of July 24, 1897, c. 11, Sec. 5, 30 Stat. 151, 205;

Act of Aug. 5, 1909, c. 6, Sec. 6, 36 Stat. 11, 85;

Act of Oct. 3, 1913, c. 16, Sec. IV, Par. E, 38 Stat. 114, 193;

Act of Sept. 21, 1922, c. 356, Title III, Sec. 303, 42 Stat. 858, 935,

in each of which the power to ascertain the facts, or the amount of bounty, countervailing duty, or otherwise, and translate the same into an equivalent rate or amount of duty, to be imposed in a given case, has been delegated by Congress to the Executive or an administrative officer. This has been done in variance of the legislatively fixed rate or amount of duty.

Nicholas & Co. v. *United States,* 249 U. S. 34.
Franklin Sugar Refining Co. v. *United States,* 178 Fed. 743.

In the instant case the cost of production *was found* as the proclamation of the President clearly indicates. To say that it can not be found, as alleged by the petitioner, begs the question. If instances arise where the cost of production can

not be found, the President does not and can not act, and in such cases the statute would be inoperative only but it would not for that reason be unconstitutional. The Customs Administrative Acts for all time have measured duties by the cost of production found by appraising officers, even though the statute did not expressly provide therefor.

Muser v. *Magone,* 155 U. S. 240.

The statute does not empower the President to exercise discretion, opinion, etc., to determine the amount of the tax, but merely a discretion as to when Section 315 shall operate.

The contention of the petitioner that it appears on the face of the statute that it provides for a levy for trade advantage to particular citizens, and is therefore not a tax laid for the "common defense and general welfare," is without merit. It might be contended with equal reason that every dutiable provision in a protective tariff Act is designed to provide a levy for the trade advantage of a particular citizen or group of citizens. It is a matter of public history that many of our tariff Acts, including the present one, have been framed on the underlying policy of protection.

Act of June 26, 1884—

> An Act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade, etc., c. 121, Sec. 14, 23 Stat. 53, 57,

and the tariff Acts of—

July 24, 1897, c. 11, Sec. 5, 30 Stat. 151, 205;

Aug. 5, 1909, c. 6, Sec. 6, 36 Stat. 11, 85;

May 27, 1921, c. 14, 42 Stat. 9; and

Sept. 21, 1922, c. 356, 42 Stat. 858.

Note also *United States* v. *Stone & Downer Co.*, No. 150, October Term, 1926, decided May 16, 1927 (not yet reported), page 12 of the opinion.

Whatever encourages the industries of the United States and tends to maintain their existence in competition with foreign countries, is obviously for the general welfare of the United States. Whatever provides revenue for the conduct of the Government of the United States obviously provides for its general welfare.

With respect to the contention urged by petitioner that the acts of the President under Section 315 are not subject to judicial review, reference is made to:

Auffmordt v. *Hedden*, 137 U. S. 310, 324;
Passavant v. *United States*, 148 U. S. 214, 220;
Stairs v. *Peaslee*, 18 How. (59 U. S.) 521;
Hilton v. *Merritt*, 110 U. S. 97, 107.

In the latter case this Court used the following language:

> The plaintiffs in error contended further that a denial of the right to bring an action at law to recover duties paid under an alleged excessive valuation of dutiable merchandise, is depriving the importer of his

property without due process of law, and is therefore forbidden by the Constitution of the United States. The cases of *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, and *Springer* v. *United States*, 102 U. S. 686, are conclusive on this point against the plaintiff in error.

CONCLUSION

The validity of this statute is a matter not open to reasonable disputation. There is nothing to be gained by issuing the writ of certiorari for the purpose of affirming the judgment. For all practical purposes the denial of the writ will set the question at rest.

The petition is therefore without merit and should be denied.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
CHARLES D. LAWRENCE,
Assistant Attorney General.
MARION DEVRIES,
Special Assistant to the Attorney General.

MAY, 1927.

○

INDEX

	Page
Opinions below	1
Jurisdiction	1
The questions	2
The statute	3
Statement	7
Summary of argument	8
Argument:	
I. Section 315 of the Tariff Act of 1922 does not unlawfully delegate legislative power	10
II. Protective tariffs are authorized	26
Conclusion	29
Appendix:	
Report of the United States Tariff Commission to the President, transmitted May 14, 1924, concerning differences in cost of production of barium dioxide in the United States and in competing foreign countries	31
Proclamation by the President increasing rate of duty on barium dioxide	42
Digest of Tariff Commission Reports under section 315 of the Tariff Act of 1922	45

CITATIONS

Cases:	
Abby Dodge, The, 223 U. S. 166	28
Brig Aurora, The, 7 Cranch 382	14, 15
Brolan v. *United States*, 236 U. S. 216	28
Buttfield v. *Stranahan*, 192 U. S. 470	18, 27
Field v. *Clark*, 143 U. S. 649	14
Interstate Commerce Commission v. *Goodrich Transit Co.*, 224 U. S. 194	19
Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149	20
Miller v. *Mayor of New York*, 109 U. S. 385	18
Monongahela Bridge Co. v. *United States*, 216 U. S. 177	18
Mutual Film Corp. v. *Kansas*, 236 U. S. 248	20
Mutual Film Corp. v. *Ohio Industrial Commission*, 236 U. S. 230	19
Oceanic Navigation Co. v. *Stranahan*, 214 U. S. 320	28
Red "C" Oil Mfg. Co. v. *North Carolina*, 222 U. S. 380	18
Strathearn S. S. Co. v. *Dillon*, 252 U. S. 348	28

Cases—Continued. Page
Union Bridge Co. v. *United States*, 204 U. S. 364 18
United States v. *Grimaud*, 220 U. S. 506 20
United States v. *Lippman, Spier & Hahn*, 260 U. S. 742 2
Washington v. *Dawson & Co.*, 264 U. S. 219 ..... 20, 21
Wayman v. *Southard*, 10 Wheat. 1 ..... 14, 21
Weber v. *Freed*, 239 U. S. 325 28
Yee Hem v. *United States*, 268 U. S. 178 28
Statutes:
Act of July 4, 1789, c. 2, 1 Stat. 24 ..... 26, 27
Tariff Act of September 21, 1922, c. 356, 42 Stat. 858, 860, 941:
Title I, par. 12; U. S. C. Title 19, sec. 121 3
Title III, sec. 315; U. S. C. Title 19, sec. 154 3
Miscellaneous:
35 Op. A. G. 29 11
35 Op. A. G. 325 24
Cong. Rec., 67th Cong., 2d sess., vol. 62, pt. 12, p. 12508 ... 11
"The relation of transportation costs to costs of production," published by the United States Tariff Commission, Government Printing Office, 1926 11

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 242

J. W. HAMPTON, JR., & CO., PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Board of General Appraisers (now United States Customs Court), R. 11–71, is reported in 49 T. D. 593, T. D. 41478. The opinion of the United States Court of Customs Appeals, R. 73–105, is reported in 14 Ct. Customs Appeals 350; 51 T. D. 224, T. D. 42030.

JURISDICTION

The judgment of the Court of Customs Appeals was entered February 24, 1927. (R. 105.) Its mandate was issued March 26, 1927. (R. 105.) The petition for certiorari was filed May 10, 1927,

and granted June 6, 1927. (R. 106.) The jurisdiction of this Court to issue a writ of certiorari to review a judgment of the Court of Customs Appeals is conferred by Section 195 of the Judicial Code, as amended by the Act of August 22, 1914, c. 267, 38 Stat. 703, but as limited by Section 8 (a) of the Act of February 13, 1925. *United States* v. *Lippmann, Spier & Hahn*, 260 U. S. 742. The Attorney General filed a certificate of importance October 16, 1926. (R. 72.) The Act of August 22, 1914, prescribes a limit of sixty days after the mandate issues within which to apply for certiorari. Section 8 (a) of the Act of February 13, 1925, prescribes a limitation of three months from the date of the judgment. Both limitations apply as the Act of 1925 did not enlarge any period of limitation prescribed by other statutes. In this case the petition was filed in time under both statutes.

THE QUESTIONS

This case presents the question whether the flexible tariff provisions of the Tariff Act of 1922, giving to the President power to increase or decrease tariffs, within limits fixed by the statute, to equalize differences in costs of production at home and abroad, found by him to exist after inquiry and report by the Tariff Commission, are unconstitutional, as a delegation of legislative power.

Another question, if it may be called a question, is whether Congress has power, when laying duties on imports, to frame the statute to protect American industry.

THE STATUTE

The Tariff Act of September 21, 1922 (c. 356, 42 Stat. 858, 860; U. S. C. Title 19, Section 121), paragraph 12, of Title I, provides a duty as follows:

> Par. 12. * * * barium dioxide, 4 cents per pound; * * *.

Section 315 of Title III of the Act (c. 356, 42 Stat. 858, 941; U. S. C. Title 19, Section 154) is as follows:

> Sec. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign

country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the said differences in costs of production in the United States and the principal competing country can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as

defined in subdivision (f) of section 402 of this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provision of paragraphs (1), (2), and (3) of subdivision (a) of section 402 of this Act.

(c) That in ascertaining the differences in costs of production, under the provisions of

subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall

be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(d) For the purposes of this section any coal-tar product provided for in paragraphs 27 or 28 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results substantially equal to those accomplished by the domestic product when used in substantially the same manner.

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

(f) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported articles of the class or kind of articles upon which the President has made a proclamation under the provisions of subdivision (b) of this section and for the form of invoice required at time of entry.

STATEMENT

June 20 and 24, 1924, the petitioner imported at the port of New York 292 drums of barium dioxide. (R. 8.) Paragraph 12 of Title I of the Tariff Act of

1922 provides a duty at four cents per pound. Prior to the arrival of this merchandise and on May 19, 1924, the President had issued a proclamation, pursuant to Section 315 of Title III of the Tariff Act of 1922, raising the rate from four cents per pound to six cents per pound, and the collector assessed the duty at six cents per pound in accordance with the proclamation. The importer thereupon filed a protest claiming that the merchandise was dutiable at four cents per pound (R. 7), and asserting that Section 315 is unconstitutional and void because a delegation of legislative power and because the section purports to levy duties not for the purposes of raising revenue but for the protection of American industries (R. 8). This protest, in due course, was referred by the collector to the Board of General Appraisers (R. 9), and the Board overruled the protest and sustained the assessment by the collector (R. 71). The petitioner then took the case to the United States Court of Customs Appeals (R. 1), and the assignments of error raised the points here presented (R. 2). The United States Court of Customs Appeals affirmed the judgment of the Board of General Appraisers. (R. 105.) The proclamation of the President and the report of the Tariff Commission, on which it was founded, are set forth in the appendix.

SUMMARY OF ARGUMENT

I. The statute does not attempt an unlawful delegation of legislative authority. It delegates to the President the power to find facts, not the power

to make law. He is to determine, with the assistance of the Commission, the domestic and foreign costs of production and the difference between them. The rules to be applied to the facts so found, in order to determine the new rate of duty, are prescribed by the statute. Congress may delegate to others a fact-finding power which the Legislature may rightfully exercise itself. Although Congress can not delegate its power to make the law, it can make a law delegating a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. The rule of law prescribed by this statute is, that within the limits fixed in the statute, tariffs shall be adjusted to equalize the difference in the costs of production of foreign and domestic merchandise.

That in some case such costs may not be ascertainable does not make the statute invalid, but merely renders it inoperative in the particular case. That there may be difficulty in ascertaining the exact costs of production does not render it invalid. Because of limits fixed by the statute upon changes in rates, exact costs of production are not necessary to be known in the majority of cases. In them it is enough to know that the costs are not less in some cases or more in others than stated amounts. The discretion left to the President under this statute is a discretion in matters of fact and in respect of the weight of evidence and not as to the rules or principles to be applied.

II. The contention that a tariff Act framed with a view to the protection of American industry is beyond the power of Congress is without any substance.

ARGUMENT

I

SECTION 315 OF THE TARIFF ACT OF 1922 DOES NOT UNLAWFULLY DELEGATE LEGISLATIVE POWER

The purpose of Congress in enacting Section 315 was to bring about increases or decreases in the tariffs to equalize differences in the costs of production at home and abroad which might be disclosed as the result of inquiry by the President and the Tariff Commission. The purpose was not only to raise revenue, but to so adjust the tariff as not, on the one hand, to exclude foreign merchandise or, on the other, to admit it under conditions giving the foreign manufacturer or producer an advantage over domestic producers in the markets of the United States. Although the Act uses the phrase "costs of production" at home and abroad, by it was not meant merely the cost at the point of manufacture or production. The markets within the United States are the only places where competition between foreign and domestic merchandise occurs which is affected by our tariffs, and, in respect to products of foreign countries, by cost of production was undoubtedly meant the cost of placing the foreign products in our markets.

This is made clear not only by the general scope and purpose of the Act, but by subdivision (c) of

Section 315, which provides that the President, in so far as he finds it practicable, shall take into consideration not only the differences in conditions in production, including wages, costs of material, and other items in costs of production, but differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States, as well as advantages granted to a foreign producer by a foreign Government and any other advantages or disadvantages in competition. The cost of transportation from the foreign point of production to the markets of the United States is therefore an element in determining the cost of production within the meaning of this statute. The Attorney General so construed the Act in an opinion rendered February 2, 1926. (35 Op. 29.) See, also, "The relation of transportation costs to costs of production," a pamphlet by the United States Tariff Commission, Government Printing Office, 1926.

When this bill came from conference Mr. Fordney, Chairman of the Committee on Ways and Means, in charge of the measure, said:

> * * * the bill directs the Tariff Commission to find the difference between the cost of production in the United States and the landed cost of the imported article and to report the same to the President of the United States. (Cong. Record, 67th Cong., 2d Sess., Vol. 62, Part 12, p. 12508.)

The final decision is left to the President, but there must, first, be an investigation and report by the

Tariff Commission. Before any change in the tariff may be made by the President he must find, as a fact, that there are differences in the costs of production at home and abroad, and that such change is necessary to equalize the differences. If, in any case, costs of production are not ascertainable, no change can be made. If the duty fixed by the Act is a specific duty, such as that on barium dioxide, the only adjustment permitted is an increase or decrease of the rate, but the increase or decrease may not exceed 50 per cent of the rate specified in the Act. No change in the form of duty, such as a change from a specific to an *ad valorem* basis, is permitted.

If the duty fixed by the Act is on an *ad valorem* basis, the increase or decrease may be brought about by the President by an increase or decrease in the rate, with the same 50 per cent limitation, or by change in classification, as provided in subdivision (a), but if these methods of equalizing the difference in costs of production are inadequate, the President is directed by subdivision (b) to change the basis of the *ad valorem* duty from the foreign value to the American selling price. In that case the rate fixed by the statute shall not be increased, nor shall it be decreased more than 50 per cent.

From this brief analysis of the statute, it is evident that the policy declared in the statute, which the President is directed to apply, is that, so far as the limitations fixed by the statute permit, the tariff shall be adjusted to equalize the difference between the costs of domestic and foreign merchandise in the

markets of the United States. The statute not only prescribes a principle to be applied, but a specific formula. To the President is left the finding of facts. When the facts are found, the statute does the rest. Aside from the finding of fact as to costs of production, the action of the President is hardly more than an announcement of the result.

Under subdivision (a) the President may choose between changing the rate and changing the classification, but only for the purpose of producing the result prescribed by the statute, which is to fix a tariff equalizing the difference in costs of production. If the method prescribed in subdivision (a) in the case of *ad valorem* duties does not equalize the difference, the statute itself in subdivision (b) directs that the American-selling price basis shall be adopted, and the statutory rate left as it is or decreased to the point necessary to make the equalization. The petitioner suggests that, under subdivision (b), since the decrease in rate may not be more than 50 per cent of the statutory rate, a case may be imagined where the use of the American-selling price as a basis would result in a tariff higher than that necessary to equalize differences in costs of production, but if any such case ever arises the result will be one expressly directed by Congress.

It has long been settled that although a legislature can not delegate its power to make a law, it may by law delegate a power to determine some fact or state of things upon which the law makes, or intends to

make, its own action depend. One of the earliest cases is *The Brig Aurora*, 7 Cranch 382.

In *Wayman* v. *Southard*, 10 Wheat. 1, Chief Justice Marshall said (p. 41):

> It will not be contended, that congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. *But congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.* * * * (Italics ours.)

In *Field* v. *Clark*, 143 U. S. 649, the Court dealt with a section of a tariff Act which read as follows (p. 680):

> That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, * * * *whenever, and so often as the President shall be satisfied* that the government of any country producing and exporting sugars, molasses, coffee, tea and hides, * * * *imposes duties or other exactions upon the agricultural or other products of the United States*, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States *he may deem to be reciprocally unequal and unreasonable*, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea and hides, the production of such country, *for such time as he shall deem just*, and in such case and during such suspension duties shall be levied, collected and paid upon

> sugar, molasses, coffee, tea and hides, the product of or exported from such designated country as follows, namely: (Here follows an enumeration of such articles and the prescribed duties.) (Italics ours.) (26 Stat., 612.)

The Court, after reviewing many Acts of Congress, deemed by it similar to this and as a congressional precedent therefor, and upon the authority of the case of *The Brig Aurora, supra*, said:

> That Congress can not delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The act of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the President with the power of legislation. For the purpose of securing reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea and hides, Congress *itself* determined that the provisions of the act of October 1, 1890, permitting the free introduction of such articles, should be suspended as to any country producing and exporting them, that imposed exactions and duties on the agricultural and other products of the United States, which the President *deemed*, that is, *which he found to be*, reciprocally *unequal* and *unreasonable*. Congress *itself* prescribed, in advance, the duties to be levied, collected and paid, on sugar, molasses,

coffee, tea or hides, produced by or exported from such designated country, while the suspension lasted. *Nothing involving the expediency or the just operation of such legislation* was left to the determination of the President. The words, "*he may deem*," in the third section, of course, implied that the President would examine the commercial regulations of other countries producing and exporting sugar, molasses, coffee, tea and hides, *and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products. But when he ascertained the fact* that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, *it became his duty to issue a proclamation* declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the *enforcement* of the policy established by Congress. *As the suspension was absolutely required when the President ascertained the existence of a particular fact, it can not be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws.* Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. *What the President was required*

to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed.

"The true distinction," as Judge Ranney speaking for the Supreme Court of Ohio has well said, "is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and *conferring authority or* discretion as to its execution, to be exercised under and in *pursuance of the law.* The first can not be done; to the latter no valid objection can be made." *Cincinnati, Wilmington, &c., Railroad* v. *Commissioners,* 1 Ohio St., 88. In *Moers* v. *City of Reading,* 21 Penn. St., 188, 202, the language of the court was: "Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it can not be said that the exercise of such discretion is the making of the law." So, in *Locke's Appeal,* 72 Penn. St., 491, 498: "To assert that a law is less than a law, because it is made to depend on a future *event or act,*

> is to rob the ligislature of the power to act wisely for the public welfare *whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.*" The proper distinction the court said was this: "The legislature can not delegate its power to make a law; *but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.* To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which can not be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation." [*Field* v. *Clark*, 143 U. S. 649, at pp. 692–694.] (Italics ours.)

See *Miller* v. *Mayor of New York*, 109 U. S. 385; *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, 192.

In *Buttfield* v. *Stranahan*, 192 U. S. 470, the Court sustained an Act authorizing administrative officers to establish standards of purity and wholesomeness of tea and to exclude from the country tea which did not conform to those standards.

In *Red "C" Oil Mfg. Co.* v. *North Carolina*, 222 U. S. 380, a case arising in a Federal court, it was held that legislative power which belonged exclusively to a State legislature was not delegated by a State statute requiring that illuminating oils furnished in

that State be safe, pure, and afford a satisfactory light, and directing that a board of agriculture determine what oils would measure up to those standards.

In *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, it was held that no unlawful delegation of legislative power was made by a statute authorizing the Interstate Commerce Commission to prescribe a uniform system of accounting and bookkeeping for interstate carriers. The Court said (p. 214):

> The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress.

In *Mutual Film Corporation* v. *Ohio Industrial Commission*, 236 U. S. 230, the Court sustained a State film censorship law which provided that (p. 240):

> Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board.

and at page 245:

> Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but

> an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and in execution.

(See, also, *Mutual Film Corporation* v. *Kansas*, 236 U. S. 248.)

In *United States* v. *Grimaud*, 220 U. S. 506, the Court construed an Act authorizing the Secretary of Agriculture to make rules and regulations governing the national parks, and held that such a rule relating to grazing sheep on forest reserves, having the force of law and providing criminal punishment for violation thereof, was not unconstitutional as a delegation of legislative power. The Court said (p. 521):

> That "Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field* v. *Clark*, 143 U. S., 649, 692. But the authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense.

The only cases we find in which this Court has declared legislation unconstitutional, upon the ground that it delegated legislative power, are *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, and *Washington* v.

Dawson & Co., 264 U. S. 219, in which it was held that Acts of Congress which undertook to permit the application of workmen's compensation laws of the several States to injuries within the maritime and admiralty jurisdiction were invalid.

The present case is squarely within the principle stated in this long line of decisions. Congress has not delegated to the President its power to make a law. It could undertake in every case, through committees, to determine for itself costs of production at home and abroad, and it has thus delegated to the President power to do a thing which the Congress itself may do, but that is not a delegation of legislative authority. As Chief Justice Marshall said in *Wayman* v. *Southard*, *supra:*

> Congress may certainly delegate to others, power which the legislature may rightfully exercise itself.

Petitioner asserts that the Act is unconstitutional because the President is allowed under it to exercise discretion. He may exercise discretion and judgment, but it is in respect of matters of fact and the weight to be given to evidence and the inferences to be drawn from it. Once the facts are settled and difference in costs of production has been ascertained, he is bound to compute and proclaim the new tariff according to the directions of the statute.

A large part of the petitioner's brief is devoted to assertions that the subject is so complicated that costs of production at home and abroad are not ascertainable. This is a mere assertion, not supported by

the record. In the case of barium dioxide the report of the Tariff Commission discloses that it had no difficulty in ascertaining the costs of production at home and abroad with sufficient accuracy to apply the statute. The courts may not take judicial notice of the circumstances entering into the costs of production of all imported articles or say, as a matter of judicial knowledge, that such costs are not ascertainable.

In any case where the costs are not ascertainable, the President is not authorized to make any change in the tariff, and the presumption is he will not. Of the 25 cases in which the Tariff Commission has made reports, under Section 315, in two (those relating to sugar and casein) the President declined to change the tariff because the costs had not been ascertained with sufficient definiteness to justify it.

In the sugar report, the Commission divided 3 to 2 as to the matter of costs, and the President held that the costs had not been ascertained with sufficient definiteness to justify a change in the tariff. In the report on casein, the Commission held that the data available did not disclose the costs definitely, and the President made no change in the tariff. The mere fact that Section 315 does not operate to produce any change in the tariff where the costs are not ascertainable does not make the statute invalid as an unlawful delegation of legislative authority.

Furthermore, because of the limits placed by the statute upon the extent of changes in tariffs under Section 315, it is not always necessary to determine

costs of production at home and abroad with any great degree of accuracy. This is illustrated by the present case. The specific duty fixed by the statute on barium dioxide was four cents per pound. Subdivision (a) of Section 315 limited the President to increasing or decreasing this duty not to exceed 50 per cent of the statutory rate. The maximum duty which he could fix under the statute was six cents per pound. The Commission reported and the President found that the difference in costs of production at home and in the principal competing foreign country was more than six cents per pound.

In the present case it was necessary only to determine that the difference in cost was at least six cents per pound. So, in the case of the report on iron in pigs, on which the statutory duty was 75 cents per ton, the maximum to which it could be raised under Section 315 was $1.125 per ton. The report of the Commission discloses that the difference in costs of production at home and abroad was over $7 per ton, and it was unnecessary in that case to do more than find that the difference exceeded $1.125 per ton.

There have been 25 reports by the Tariff Commission under this section. In two, those relating to sugar and casein, no change in tariff was made because the costs were not ascertainable. In one, that relating to cotton warp-knit fabric and fabric gloves, the difference in costs was found, but as the existing duty equalized it, no change in the tariff was made. In one, relating to wall pockets, the Commission

89167—28——4

reported that there was no substantial production in the United States. In the other 21 cases, changes in tariffs have been made. In 12 of these it was unnecessary to find the exact costs of production at home and abroad, because it developed that the differences were so great that the maximum changes in tariffs permitted by the statute would not equalize them.

This subject was dealt with by the Attorney General in an opinion rendered to the President October 19, 1927 (35 Op. 325), relating to the case of rag rugs. In that case the Tariff Commission had become satisfied that the cost of production of rag rugs in Japan did not exceed the invoice price of imported Japanese rugs. It had, however, made no thorough investigation into the costs of wages, materials, and other items entering into the cost of production in Japan, and the question arose whether it had made such a report as the statute makes a condition precedent to action by the President, as it had not made a report on costs of wages, materials and other items specified in subdivision (c) of the Act, as matters which the President shall take into consideration in so far as he finds it practicable.

The Attorney General reached the conclusion in that case that as it had been determined that the Japanese cost of production was not more than a stated amount, and since the difference between the costs of production in the United States and in Japan on that basis was so great that the maximum change permitted by the statute in the tariff would not

equalize it, there was no necessity for minute investigation of wages and costs of materials in Japan, and that such an investigation might be held by the President to be impracticable because futile.

The reports of the Tariff Commission under Section 315 and the proclamations of the President thereunder, have been printed only in pamphlet form. A digest of them is contained in the appendix to this brief.

There is nothing more intricate or difficult about the finding of costs of production of merchandise than in determining what is a reasonable charge for carriage of a commodity by railroads. Fixing the rates for public utilities is a legislative matter. Examining the facts to determine what is a reasonable rate is delegated to commissions and boards, but that is not an unlawful delegation of legislative authority merely because the facts are difficult to ascertain.

Presence or absence of the right to judicial review of the findings of the Commission and of the President under Section 315 has nothing to do with the question whether there is an unlawful delegation of legislative authority. If the Legislature has made an unlawful delegation of legislative power to the executive branch, it would not help matters to bring the judiciary into the matter.

In those cases where the exercise of legislative power may run counter to the constitutional provision preventing confiscation of private property, as in rate making, ultimate judicial review of legislative or administrative findings of facts as to the reason-

ableness of rates must be allowed, but no importer has a constitutional right to any particular tariff, and a tariff may be raised or lowered so as to destroy an importer's business without giving him any right to relief in the courts.

Of course, if the provisions of Section 315 are not complied with, and the President should depart from the formula prescribed in it or should act without receiving a report from the Tariff Commission, or in other respects plainly exceed the powers vested in him by this statute, an importer might obtain judicial relief from the duty thus imposed, but no such question is presented here, and we can not see how the matter of judicial review has anything to do with this case.

It seems clear that the statute delegates only the power to find facts, not the power to make laws, and under elementary rules long settled it must be sustained against the charge that it unlawfully delegates legislative authority.

II

PROTECTIVE TARIFFS ARE AUTHORIZED

It is too late in the day to question the power of Congress to protect American industry, through the operation of laws imposing duties on imports. In the first session of the first Congress, the second law placed on the statute books (Act of July 4, 1789, c. 2, 1 Stat. 24) declared that the duties there named were imposed because—

> it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures, that duties be laid on goods, wares and merchandise imported.

Congress has power not only to tax foreign commerce, but to regulate it. In *Buttfield* v. *Stranahan*, 192 U. S. 470, it was said (p. 492):

> The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. *Lottery Case*, 188 U. S. 321, 353–356; *Leisy* v. *Hardin*, 135 U. S. 100, 108. Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than fifty years, regulating the degree of strength of drugs, medicines and chemicals entitled to ad-

mission into the United States and excluding such as did not equal the standards adopted. 9 Stat. 237; Rev. Stat. sec. 2933 *et seq.*

The power to regulate foreign commerce is certainly as efficacious as that to regulate commerce with the Indian tribes. And this last power was referred to in *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, 194, as exclusive and absolute, and was declared to be "as broad and as free from restrictions as that to regulate commerce with foreign nations."

* * *

See also *The Abby Dodge*, 223 U. S. 166.

Brolan v. *United States*, 236 U. S. 216, 218.

Weber v. *Freed*, 239 U. S. 325, 329.

Yee Hem v. *United States*, 268 U. S. 178.

Oceanic Navigation Co. v. *Stranahan*, 214 U. S. 320, 334, 342.

Strathearn S. S. Co. v. *Dillon*, 252 U. S. 348, 356.

CONCLUSION

The sections of the Tariff Act in question are valid and the judgment of the Court of Customs Appeals should be affirmed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

CHARLES D. LAWRENCE,
Assistant Attorney General.

MARION DE VRIES,
Special Assistant to the Attorney General.

ROBERT P. REEDER,
Attorney.

FEBRUARY, 1928.

APPENDIX

(Report of the United States Tariff Commission to the President of the United States, transmitted May 14, 1924)

INVESTIGATION OF THE DIFFERENCES IN COSTS OF PRODUCTION OF BARIUM DIOXIDE

To the President:

The United States Tariff Commission respectfully submits the following report upon an investigation of the differences in costs of production of barium dioxide in the United States and in competing foreign countries, for the purposes of section 315 of Title III of the tariff act of 1922.

INTRODUCTORY

Reference to files.—The following documents have been used in the preparation of this report and are on file for reference in the office of the Tariff Commission:

Files of original documents, including applications (2) and expert's preliminary report.

Confidential report to commission, dated October 29, 1923. (Referred to as Expert's 10/29 report.)

Public statement of information on barium dioxide dated November 5, 1923.

Stenographer's minutes of public hearing on November 9, 1923.

Brief for John Bené & Sons; a petitioner, by Walter Evans Hampton, dated New York, November 15, 1923. (Referred to as Opposition brief.)

Confidential memorandum of chemical division relative to weighted average costs of production, dated December 6, 1923. (Referred to as Expert's 12/6 memorandum.)

Advisory board's confidential summary to the commission, dated December 12, 1923. (Referred to as Board's summary.)

Rates of duty.—Act of 1922, paragraph 12, 4 cents per pound. (This duty during 1923 was equivalent to 47.6 per cent ad valorem based on an average invoice price of 8.4 cents per pound.)

Act of 1913, paragraph 10, 1½ cents per pound. (This duty during the period October 4, 1913, to June 30, 1914, was equivalent to 27.8 per cent ad valorem based on an average invoice price of 5.4 cents per pound.)

Act of 1909, paragraph 3, 25 per cent ad valorem. (This duty of 25 per cent ad valorem during the period 1910 to 1913, inclusive, was equivalent, applied to an average invoice price of 6.87 cents per pound, to a specific duty of 1.72 cents per pound.)

History of the investigation.—On March 27, 1923, the commission ordered an investigation of barium dioxide for purposes of section 315 of the tariff act of 1922. Application No. 87, requesting an increase in the duty on barium dioxide, was received on November 28, 1922, from the J. H. R. Products Co. of Willoughby, Ohio. Application No. 121, requesting a decrease in the duty on barium dioxide, was received on January 22, 1923, from John Bené & Sons (Inc.), of New York City.

The domestic and foreign cost investigations were conducted during the months of May to July, 1923. After public notice had been given in due form the customary public hearing was held at the office of

the commission in Washington on November 9, 1923. The hearing was closed on that date, and November 20, 1923, was set as the date for filing briefs. Oral argument was waived by interested parties.

Because of the change in the monetary system of Germany, which took place in November, 1923, when the rentenmark was introduced, the commission thought it advisable to ascertain the effect of this stabilized currency on Germany production costs for barium dioxide. Representatives of the commission in Germany also obtained German production costs for March, 1924. It was ascertained by the commission that domestic costs for the first quarter of 1924 had not changed substantially over those for 1922, which are given in this report.

INFORMATION OBTAINED IN COMMISSION'S INVESTIGATION

From the investigation of barium dioxide as outlined above, the following information has been obtained:

PRINCIPAL USES

Barium dioxide, more correctly known as barium peroxide, is employed chiefly in the manufacture of hydrogen peroxide, which is widely used as a bleaching agent and as an antiseptic. Hydrogen peroxide made from barium dioxide competes with hydrogen peroxide made either from sodium peroxide or by an electrolytic process. (Expert's 10/29 report, pp. 1–2 and Minutes, public hearing, pp. 66ff.)

PRODUCTION, CONSUMPTION, IMPORTS, AND EXPORTS

Prior to the World War barium dioxide was not produced in the United States. According to the reports of the United States Geological Survey,

domestic production, which began in 1915, increased from 612,000 pounds in that year to 5,110,000 pounds in 1917, and then declined to 1,716,000 pounds in 1919. Production in 1922 showed a slight increase over that in 1919. (Expert's 10/29 report, p. 2.) Accurate statistics of foreign production are not available; Germany is probably the largest foreign producer, with England and France probably second and third, respectively. (Expert's 10/29 report, p. 3.)

During the period 1918 to 1923 the domestic consumption has averaged 4,000,000 pounds per year. The J. H. R. Products Co., applying for an increase in the duty, has plant capacity sufficient to supply this requirement. (Expert's 10/29 report, p. 3.)

From 1910 to 1914 imports ranged from three and one-half to six million pounds per year. Imports from 1910 to 1923 have been as follows (Expert's 10/29 report, p. 4):

TABLE 1.—*Barium peroxide—Imports for consumption, 1910–1924*

Year	Pounds	Foreign invoice value	Unit invoice value per pound
Fiscal year:			
1910	3,563,528	$261,674	$0.073
1911	4,896,563	347,129	.071
1912	3,715,823	255,053	.069
1913	3,507,508	215,500	.061
1914 [1]	882,385	49,611	.056
1914 [2]	5,203,413	280,528	.054
1915	4,084,144	317,262	.077
1916	546,442	48,451	.088
1917 [3]			
1918 [3]			
Calendar year:			
1919 [3]			
1920	501,673	64,447	.128
1921	1,337,972	127,631	.095
1922 (first 9 months)	1,304,143	125,065	.096
1922 (last 3 months)	714,051	64,269	.090
1923	1,810,593	152,270	.084
1924 (Jan.-Mar.)	298,805	22,467	.075

[1] From July 1 to Oct. 3, 1913.
[2] From Oct. 4, 1913, to June 30, 1914. Exports of barium dioxide are negligible.
[3] No imports.

PRICES

Barium dioxide prices were not published in the trade journals prior to July, 1915, when the price was 22 cents per pound. In July, 1916, the quoted price was 38 cents, from which figure the quoted price receded to 18–20 cents during 1923. These quotations are reported by the trade to be higher than contract prices. During 1923 the J. H. R. Products Co. claimed to have had difficulty in disposing of its product at 15 to 16 cents per pound because of competition from abroad. The New York selling prices on the foreign product, secured by the commission in December, 1923, were 13 cents per pound for English and French 87.5 per cent barium dioxide, and 13.4 cents per pound for German 80 to 82 per cent barium dioxide (equivalent to 14.3 cents per pound on the basis of 87.5 per cent barium dioxide). (Expert's 12/6 memorandum.)

Relative prices of barium dioxide and of hydrogen peroxide.—As pointed out above, barium dioxide is employed chiefly for making hydrogen peroxide, which is used industrially as a bleaching agent and for medicinal purposes. The medicinal product, if marked "U. S. P." (United States Pharmacopœia), must be an aqueous solution containing not less than 3 per cent by weight of hydrogen peroxide (H_2O_2).

Barium dioxide is known to the public in the form of hydrogen peroxide. It was stated at the public hearing that for 1 pound of barium dioxide from 4¼ to 5 pounds of hydrogen peroxide (standard 3 per cent strength) can be produced, depending upon the percentage strength of the barium dioxide used. (Minutes, public hearing, pp. 170 and 181.) It was also stated that the cost of making hydrogen peroxide was 3.6 cents per pound based on a price of 13.4 cents per pound for barium dioxide and deducting the value

of the by-product, blanc fixe, which is obtained when barium dioxide is converted into hydrogen peroxide. Upon these facts the manufacturing cost of hydrogen peroxide in bulk is less than 4 cents per pound. Based on these yields a change of 1 cent per pound in the price of barium dioxide is equivalent to a change of 1/5 cent per pound of hydrogen peroxide. Therefore, an increase in the duty on barium dioxide of 2 cents per pound would correspond to an increase in the cost of hydrogen peroxide of about 4/10 cent per pound.

Evidence given at the public hearing tends to show that hydrogen peroxide is sold in drug stores in pound bottles at retail prices ranging from 25 to 40 cents depending somewhat upon the trade-mark name under which the article is sold. The evidence also tends to show that hydrogen peroxide is sold in pound bottles in chain stores, generally not under any trade-mark, at retail prices ranging from 15 to 16 cents. (Minutes, public hearing, pp. 168, 209.

One witness stated at the hearing in November 1923 (p. 220), when the price of barium dioxide was about 15 to 16 cents per pound, that the price of hydrogen peroxide in drug stores was the same as when barium dioxide was selling for 38 cents per pound. Another witness stated (p. 222) that a change in the price of barium dioxide would affect the price of hydrogen peroxide in the chain grocery stores, where it is sold at a lower price and on a smaller margin of profit than at the drug stores.

The evidence does not indicate that an increase in the retail price of hydrogen peroxide—the form in which barium dioxide reaches the ultimate consumer—need follow an increase in the price of barium dioxide.

PRINCIPAL COMPETING COUNTRIES

The imports of barium dioxide into this country from September, 1922, to July 1, 1923, by countries of origin, have been as follows: (Expert's 10/29 report, pp. 5–5a.)

TABLE 2.—*Barium dioxide—Imports for consumption, by countries, September, 1922, to July 1, 1923*

Imported from—	Pounds	Value	Average price c. i. f. New York, duty not paid
			Per pound
Germany	920, 974	$81, 739	$0. 0888
France	349, 075	32, 940	. 0944
England	112, 608	13, 206	. 1126

The following table shows imports of barium dioxide and the average invoice price by months and by countries of origin during the period January, 1923, to March, 1924, inclusive.

TABLE 3.—*Barium dioxide—Imports for consumption, by countries, January, 1923, to March, 1924*

Year and month	Germany		England		France		Total, all countries	
	Pounds	Invoice price per pound	Pounds	Invoice price per pound	Pounds	Invoice price per pound	Pounds	Invoice price per pound
1923		*Cents*		*Cents*		*Cents*		*Cents*
January	143, 184	8. 9	33, 965	11. 5			177, 149	7. 6
February	87, 176	7. 4	11, 141	12. 9			98, 317	8. 1
March	87, 428	8. 0	33, 749	11. 1	53, 290	7. 4	194, 387	8. 4
April	174, 506	8. 0	45, 093	9. 7	67, 141	8. 0	297, 902	8. 3
May	175, 619	8. 8	11, 030	12. 1	44, 573	7. 9	231, 422	8. 8
June			55, 906	10. 6			55, 906	10. 6
July	66, 178	8. 9	22, 028	10. 4			88, 206	9. 3
August	153, 754	8. 6					153, 754	8. 6
September	151, 947	8. 5	11, 003	13. 5			162, 950	8. 9
November	213, 372	8. 0	71, 499	9. 1			284, 871	8. 3
December	55, 303	7. 1	10, 226	10. 0			65, 729	7. 6
Total	1, 308, 969	8. 0	305, 640	10. 5	175, 004	7. 7	1, 810, 893	8. 4
1924								
January			45, 386	7. 0			45, 386	7. 0
February			84, 019	8. 0			84, 019	8. 0
March			146, 977	7. 0	22, 423	8. 0	169, 400	7. 4

During the year 1923 Germany supplied 72 per cent, England 17 per cent, and France 10 per cent of the total imports of barium dioxide entering the United States. For the purposes of this investigation, it appears that Germany is the "principal competing country."

COSTS OF PRODUCTION

Domestic.—Barium dioxide is made by two companies in the United States—by the Oakland Chemical Co., of New York City, company A, for its own use, and by the J. H. R. Products Co., of Willoughby, Ohio, company B, for sale. The cost details for each of these producers and also the weighted average cost figures are given in the confidential memorandum attached to this report (not published).

Foreign.—Foreign costs were obtained by the commission in England (one company) and France (one company). The commission was unable to secure actual book costs for 1923 from either of the two producers in Germany. However, a statement of the cost of production of one German company for the first half of 1923 was furnished to the commission's representatives, who were not allowed to check or verify it. In the case of the second German company book costs for 1913 were obtained by agents of the commission. These costs were adjusted to 1923 by taking into account changes which had subsequently taken place in prices of raw materials, wages, and other cost factors. These calculations are regarded as reliable when considered in connection with selling prices of the German product. Details are presented in the attached confidential memorandum, par. 2 (not published).

Because of the change in the monetary system of Germany, which took place in November, 1923, when the rentenmark was introduced, the commission thought it advisable to ascertain the effect of this stabilized currency on German production costs for barium dioxide. The costs of the second German company referred to above were further revised as of March, 1924, by representatives of the commission in Germany. It was ascertained by the commission that domestic costs for the first quarter of 1924 had not changed substantially over those for 1922, which are given in this report.

Comparison of foreign and domestic costs.—The following table presents a comparison of the weighted average domestic costs with the German costs calculated as outlined above. In order to avoid disclosing costs of production of individual companies, such disclosures being prohibited by section 708 of the revenue act of 1916, the comparison is made in percentages, the domestic costs being taken as 100.

TABLE 4.—*Comparison of domestic and German production costs of barium dioxide by percentages*

	Domestic costs, 1922	German costs	
		June, 1923	March, 1924
Materials	100	[1] 33. 6–37. 4	[1] 44. 7–49. 8
Containers	100	73. 4	73. 4
Direct labor	100	9. 25	30. 7
Factory expense	100	15. 8	37. 6
General expense	100	104. 0	60. 5
Total factory cost	100	[1] 32. 9–34. 7	[1] 42. 6–45. 0

[1] The variation in the percentages for German material and total factory costs reflects different bases for the calculation of the domestic costs of raw materials as discussed in the attached confidential memorandum.

COMPETITIVE CONDITIONS

As previously pointed out, there is only one domestic company which produces barium dioxide for sale in the open market. The other domestic manufacturer consumes his entire production of barium dioxide for the manufacture of hydrogen peroxide. It should be noted, however, that hydrogen peroxide produced from barium dioxide competes with hydrogen peroxide produced from sodium peroxide and with hydrogen peroxide produced abroad by an electrolytic process.

Evidence was offered at the public hearing to the effect that English barium dioxide was sold to consumers in Canada for 17 cents per pound delivered at factory while at the same time it is offered in the United States for 9 to 11 cents per pound c. i. f. New York, duty unpaid, 13 to 15 cents duty paid. It was claimed that the elimination of domestic company B from the open market would be followed by the same prices in this country as prevailed in Canada. (Minutes, public hearing, pp. 53–55 and 115.)

SUMMARY

Findings of fact to the following effect are, in the judgment of the Tariff Commission, warranted by the evidence collected in the investigation and summarized in the commission's report:

1. Germany is the principal competing country.

2. The difference in costs of production between Germany and the United States is greater than 6 cents per pound. This difference between domestic and German costs exists whether the comparison is based on costs at factory or on factory costs plus transportation to the principal market—New York.

3. The present duty is 4 cents per pound. The increase in duty necessary to equalize the differences in costs of production of barium dioxide in the United States and in Germany, the principal competing country, within the limit provided in section 315, is 2 cents per pound, making the total duty 6 cents per pound.

THOMAS O. MARVIN,
Chairman.
WILLIAM S. CULBERTSON,
Vice Chairman.
DAVID J. LEWIS,
EDWARD P. COSTIGAN,
WILLIAM BURGESS,
HENRY H. GLASSIE,
Commissioners.

PROCLAMATION BY THE PRESIDENT OF THE UNITED STATES OF AMERICA INCREASING RATE OF DUTY ON BARIUM DIOXIDE

Whereas in and by section 315 (a) of Title III of the act of Congress approved September 21, 1922, entitled "An act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States, and for other purposes," it is, among other things, provided that whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in rates of duty provided in said act shown by said ascertained differences in such costs of production necessary to equalize the same;

Whereas in and by section 315 (c) of said act it is further provided that in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of said section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing

foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition;

Whereas, under and by virtue of said section of said act, the United States Tariff Commission has made an investigation to assist the President in ascertaining the differences in costs of production of and of all other facts and conditions enumerated in said section with respect to the article described in paragraph 12 of Title I of said tariff act of 1922, namely, barium dioxide, being wholly or in part the growth or product of the United States, and of and with respect to a like or similar article wholly or in part the growth or product of competing foreign countries;

Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence, and to be heard;

And whereas the President upon said investigation of said differences in costs of production of said article wholly or in part the growth or product of the United States and of the like or similar article wholly or in part the growth or product of competing foreign countries, has thereby found that the principal competing country is Germany and that the duty fixed in said title and act does not equalize the differences in costs of production in the United States and in said principal competing country, namely, Germany,

and has ascertained and determined the increased rate of duty necessary to equalize the same:

Now, therefore, I, CALVIN COOLIDGE, President of the United States of America, do hereby determine and proclaim that the increase in the rate of duty provided in said act shown by said ascertained differences in said costs of production necessary to equalize the same is as follows:

An increase in said duty on barium dioxide (within the limit of total increase provided for in said act) from 4 cents per pound to 6 cents per pound.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this nineteenth day of May in the year of our Lord one
[SEAL.] thousand nine hundred and twenty-four, and of the independence of the United States of America the one hundred and forty-eighth

CALVIN COOLIDGE.

By the President:

CHARLES E. HUGHES,
Secretary of State.

[No. 1698]

DIGEST OF TARIFF COMMISSION REPORTS UNDER SECTION 315 OF THE TARIFF ACT OF 1922.

(1) SODIUM NITRITE. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1924.

The Commission found the costs of production and the President increased the duty. The findings of the Commission show that the difference in costs was much more than could be equalized by a 50% increase in the duty, showing exact costs unnecessary to be ascertained.

(2) WHEAT AND WHEAT PRODUCTS. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1924.

The Commission found the exact costs of production at home and abroad and the exact differences, and the President raised the tariff on wheat and some wheat products and reduced it on other wheat products. The reduction in the duty on bran, shorts, and by-product feeds was 50%, and the findings show that the differences in costs were much greater than the permitted decrease in the tariff would equalize.

(3) BARIUM DIOXIDE. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1924.

The Commission found that the difference in costs was greater than six cents per pound, and the specific duty of four cents per pound was raised to the maximum permitted by law, viz., six cents per pound.

(4) DIETHYLBARBITURIC ACID AND DERIVATIVES (Barbital or Veronal). Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1925.

The findings of the Commission show that the differences in costs were greater than could be equalized by 50% increase in the rate of the ad valorem duty. The President changed the basis of computing the ad valorem duty to the American selling price and reduced the rate to 25%.

(5) OXALIC ACID. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1925.

The specific statutory duty was four cents per pound and the maximum allowed by statute was six cents per pound. The Commission did not find the differences of costs exactly, but determined that they were larger than the permitted increase in duty would equalize, and the duty was raised to the maximum.

(6) POTASSIUM CHLORATE. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1925.

The specific statutory duty was 1.5 cents per pound. The maximum allowed by law was 2.25 cents per pound. The Commission reported that the differences in costs of production were much greater than could be equalized by the permitted increase and the duty was raised to the maximum.

(7) LIVE BOBWHITE QUAIL. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1925.

The cost of trapping in Mexico was determined to be $0.517 per bird, while the cost in the United States was $0.728 per bird, the difference being $0.211 per bird. The specific duty of 50 cents per bird was found

to be $0.289 too much. The reduction permitted was only to 25 cents per bird, and the duty was changed accordingly.

(8) SUGAR. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

In this report the Commission divided 3 to 2 as to the differences in costs of production at home and abroad. The President held:

> After full consideration of all the facts shown in the reports of the members of the tariff commission I do not find that differences in cost of production are sufficiently established under present conditions to warrant any change from the present duty.

(9) CASEIN. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

The Tariff Commission reported that the data which it had been found possible to secure in its investigation in the costs of production in the domestic and foreign fields were insufficient to form a basis for any change in the duty.

(10) COTTON WARP-KNIT FABRIC GLOVES AND COTTON WARP-KNIT FABRIC. Reports of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

The Commission found the costs of production at home and abroad and also concluded that the differences were already equalized by existing tariffs, and the President took no action.

(11) TAXIMETERS. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

These were subject to a statutory compound duty of $3 each and 45% ad valorem. The Commission

found the exact difference in cost of production to be $40.98. As the difference could not be equalized under subdivision (a), the basis was changed to the American selling price, and the ad valorem rate to 27.1% instead of 45%, and the specific duty remained the same.

(12) MEN'S SEWED STRAW HATS. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

The exact costs of production at home and abroad were determined and the rate increased to 88% ad valorem, slightly less than the maximum permitted.

(13) BUTTER. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

This was subject to a statutory specific duty of eight cents per pound, the maximum allowed being twelve cents per pound. The Tariff Commissioners differed as to the costs of production at home and abroad, their differences ranging from 11.9 cents per pound to 14.95 cents per pound, or more. The President concluded that the difference was at least 12 cents per pound and fixed the maximum duty.

(14) PRINT ROLLERS. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

These were subject to an ad valorem duty of 60%. The Commission determined the exact differences in cost of production and the rate was raised to 72%, less than the maximum allowed.

(15) PAINTBRUSH HANDLES. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

These were subject to an ad valorem duty of 33⅓%. The Commission reported that the exact

difference in costs of production was not ascertainable, but that the difference was so small that a reduction of 50% in the rate of duty would not equalize it. The maximum decrease in duty permitted was made, the rate being reduced to 16⅔%.

(16) GOLD LEAF. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1926.

This was subject to a specific duty of 55 cents, which was raised to 82½ cents, the maximum permitted by law. The difference in costs of production was greater, being found to be 83.8 cents.

(17) SWISS CHEESE. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1927.

This was subject to a duty of five cents per pound, but not less than 25% ad valorem. It was raised to 7.5 cents per pound, and not less than 37½ per cent ad valorem, the maximum permitted by law.

(18) CRESYLIC ACID. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1927.

This was subject to a compound duty of 40% ad valorem and seven cents per pound. The exact difference in cost of production was determined to be 79.7% per pound. The duty was reduced to the minimum permitted by law, 20% ad valorem plus 3½ cents per pound. This produced a duty of 121.7 as against a difference in cost of 79.7, showing it was unnecessary to determine the exact difference in costs.

(19) METHANOL. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1927.

This was subject to the specific duty of 12 cents. The Commission reported that the difference in

costs of production at home and abroad was either 27.49 cents or 24.78 cents, depending on the method used to ascertain it. The duty was raised to 18 cents, the maximum permitted, and much less than was necessary to equalize the difference in costs of production.

(20) IRON IN PIGS. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1927.

This was subject to a specific duty of 75 cents per ton. The difference in costs at home and abroad was determined to be $7.16 per ton. The duty was raised to $1.125 per ton, the maximum permitted by law.

(21) PHENOL. Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1928.

This was subject to a compound duty of 40% ad valorem and 7 cents per pound. It was reduced to 20% ad valorem and 3½ cents per pound. The exact difference in costs was 36.7%, and on the same basis the new duty was 76.8, showing that it was not necessary to show the exact costs of production.

(22) MAGNESITE.—Report of the United States Tariff Commission to the President of the United States, Government Printing Office, 1928.

The crude was subject to a specific duty equivalent to $6.25 per ton. The difference in cost of production was found to be $11.10 per ton. The duty was raised to $9.375 per ton, the maximum permitted.

The specific duty on caustic calcined magnesite was equivalent to $12.50 per ton; the difference in cost $19.68 and the new duty $18.75, the maximum permitted.

(23) CHERRIES. Report of the United States Tariff Commission to the President of the United States, 1928. (Not yet printed.)

These were subject to a specific duty of 2 cents per pound, which was increased to 3 cents per pound, the maximum permitted. The difference in costs of production was 5 cents to 7 cents per pound, showing that it was not necessary to determine exact costs.

(24) WALL POCKETS. Report of the United States Tariff Commission to the President of the United States, 1928. (Not yet printed.)

It was found that there was no industry in the United States and only one concern had made wall-pockets in the United States, and its operations were never profitable and no costs data was reported.

(25) RAG RUGS. Report of the United States Tariff Commission to the President of the United States, 1928. (Not yet printed.)

These were subject to an ad valorem duty of 35% per pound. The difference in costs of production found were too great to be equalized by increasing the rate to 52.5%. Under subdivision (b) the basis was changed to the American selling price and the rate of duty left at 35%. The difference in costs was too great even to be equalized by this adjustment, so that it was not necessary to determine exact costs of production.

○

a delegation of power to tax

SUPREME COURT OF THE UNITED STATES.

No. 242.—October Term, 1927.

J. W. Hampton, Jr., & Co., Petitioner, *vs.* The United States. } On Writ of Certiorari to the United States Court of Customs Appeals.

[April 9, 1928.]

Mr. Chief Justice Taft delivered the opinion of the Court.

J. W. Hampton, Jr., & Company made an importation into New York of barium dioxide which the collector of customs assessed at the dutiable rate of six cents per pound. This was two cents per pound more than that fixed by statute, par, 12, ch. 356, 42 Stat. 858, 860. The rate was raised by the collector by virtue of the proclamation of the President, 45 Treas. Dec. 669, T. D. 40216, issued under, and by authority of, Section 315 of Title III of the Tariff Act of September 21, 1922 (ch. 356, 42 Stat. 858, 941), which is the so-called flexible tariff provision. Protest was made and an appeal was taken under Section 514, Part 3, Title IV (ch. 356, 42 Stat. 969-70). The case came on for hearing before the United States Customs Court, 49 Treas. Dec. 593. A majority held the Act constitutional. Thereafter the case was appealed to the United States Court of Customs Appeals. On the 16th day of October, 1926, the Attorney General certified that in his opinion the case was of such importance as to render expedient its review by this Court. Thereafter the judgment of the United States Customs Court was affirmed. 14 Ct. Cust. App. 350. On a petition to this Court for certiorari, filed May 10, 1927, the writ was granted June 6, 1927, 274 U. S. 735. The pertinent parts of Section 315 of Title III of the Tariff Act (ch. 356 42 Stat. 858, 941 U. S. C., Tit. 19, §§ 154, 156) are as follows:

"Section 315(a). That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States

and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equlaize the same. Thirty days after the date of such proclamation or proclamations, such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions, (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila); *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

"(c). That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

"Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

"The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in

such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified."

The President issued his proclamation May 19, 1924. After reciting part of the foregoing from Section 315, the proclamation continued as follows:

"Whereas, under and by virtue of said section of said act, the United States Tariff Commission has made an investigation to assist the President in ascertaining the differences in costs of production of and of all other facts and conditions enumerated in said section with respect to . . . barium dioxide, . . .

"Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence, and to be heard;

"And whereas the President upon said investigation . . . has thereby found that the principal competing country is Germany, and that the duty fixed in said title and act does not equalize the differences in costs of production in the United States and in . . . Germany, and has ascertained and determined the increased rate of duty necessary to equalize the same.

"Now, therefore, I, Calvin Coolidge, President of the United States of America, do hereby determine and proclaim that the increase in the rate of duty provided in said act shown by said ascertained differences in said costs of production necessary to equalize the same is as follows:

" 'An increase in said duty on barium dioxide (within the limit of total increase provided for in said act) from 4 cents per pound to 6 cents per pound.

" 'In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

" 'Done at the City of Washington this nineteenth day of May in the year of our Lord one thousand nine hundred and twenty-four, and of the Independence of the United States of America the one hundred and forty-eighth.

" 'Calvin Coolidge.

" 'By the President: Charles E. Hughes, Secretary of State.' "

The issue here is as to the constitutionality of Section 315 upon which depends the authority for the proclamation of the President and for two of the six cents per pound duty collected from the petitioner. The contention of the taxpayers is two-fold—first, they argue that the section is invalid in that it is a delegation to the President of the legislative power, which by Article I, Section 1 of the Constitution, is vested in Congress, the power being that declared in Section 8 of Article I, that the Congress shall have power

to lay and collect taxes, duties, imposts and excises. Their second objection is that, as Section 315 was enacted with the avowed intent and for the purpose of protecting the industries of the United States, it is invalid because the Constitution gives power to lay such taxes only for revenue.

First. It seems clear what Congress intended by Section 315. Its plan was to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States, so that the duties not only secure revenue but at the same time enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States. It may be that it is difficult to fix with exactness this difference, but the difference which is sought in the statute is perfectly clear and perfectly intelligible. Because of the difficulty in practically determining what that difference is, Congress seems to have doubted that the information in its possession was such as to enable it to make the adjustment accurately, and also to have apprehended that with changing conditions the difference might vary in such a way that some readjustments would be necessary to give effect to the principle on which the statute proceeds. To avoid such difficulties, Congress adopted in Section 315 the method of describing with clearness what its policy and plan was and then authorizing a member of the executive branch to carry out its policy and plan and to find the changing difference from time to time and to make the adjustments necessary to conform the duties to the standard underlying that policy and plan. As it was a matter of great importance, it concluded to give by statute to the President, the chief of the executive branch, the function of determining the difference as it might vary. He was provided with a body of investigators who were to assist him in obtaining needed data and ascertaining the facts justifying readjustments. There was no specific provision by which action by the President might be invoked under this Act, but it was presumed that the President would through this body of advisers keep himself advised of the necessity for investigation or change and then would proceed to pursue his duties under the act and reach such conclusion as he might find justified by the investigation and proclaim the same if necessary.

The Tariff Commission does not itself fix duties, but before the President reaches a conclusion on the subject of investigation, the Tariff Commission must make an investigation and in doing so must give notice to all parties interested and an opportunity to adduce evidence and to be heard.

The well-known maxim "*Delegata potestas non potest delegari*" applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private law. Our Federal Constitution and State Constitutions of this country divide the governmental power into three branches. The first is the legislative, the second is the executive, and the third is the judicial, and the rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power, the President or the State executive, the Governor, the executive power, and the Courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not coordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches insofar as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination.

The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations. *United States* v. *Grimaud,* 220 U. S. 506, 518; *Union Bridge Co.* v. *United States,* 204 U. S. 364; *Buttfield* v. *Stranahan,* 192 U. S. 470; *In re Kollock,* 165 U. S. 526; *Oceanic Navigation Co.* v. *Stranahan,* 214 U. S. 320.

Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be affected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district. As Judge Ranney of the Ohio Supreme Court in *Cincinnati, Wilmington and Zanesville Railroad Co.* v. *Commissioners,* 1 Ohio St. 77, 88, said in such a case:

"The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of law. The first can not be done; to the latter no valid objection can be made". See also *Moers* v. *Reading,* 21 Penn. St. 188, 202; *Locke's Appeal,* 72 Penn. St. 491, 498.

Again, one of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates, Congress may provide a Commission, as it does, called the Interstate Commerce Commission, to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down that rates shall be just and reasonable considering the service given and not discriminatory. As said by this Court in *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194, 214, "The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress".

The principle upon which such a power is upheld in state legislation as to fixing railway rates is admirably stated by Judge Mitchell, in the case of *State* v. *Chicago, Milwaukee & St. Paul Railway Company,* 38 Minn. 281, 298 to 302. The learned Judge says on page 301:

"If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject, and who, after investigation of the facts, can fix rates with reference to the peculiar circumstances of each road, and each particular kind of business, and who can change or modify these rates to suit the ever-varying conditions of traffic. . . . Our legislature has gone a step further than most others, and vested our commission with full power to determine what rates are equal and reasonable in each particular case. Whether this was wise or not is not for us to say; but in doing so we can not see that they have transcended their constitutional authority. They have not delegated to the commission any authority or discretion as to what the law shall be,—which would not be allowable,—but have merely conferred upon it an authority and discretion, to be exercised in the execution of the law, and under and in pursuance of it, which is entirely permissible. The legislature itself has passed upon the expediency of the law, and what it shall be. The commission is intrusted with no authority or discretion upon these questions". See also the language of Justices Miller and Bradley in the same case in this Court. 134 U. S. 418, 459, 461, 464.

It is conceded by counsel that Congress may use executive officers in the application and enforcement of a policy declared in law by Congress and authorize such officers in the application of the Congressional declaration to enforce it by regulation equivalent to law. But it is said that this never has been permitted to be done where Congress has exercised the power to levy taxes and fix customs duties. The authorities make no such distinction. The same principle that permits Congress to exercise its rate making power in interstate commerce by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise. If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home and abroad, it may authorize the

Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under Congressional authority. This conclusion is amply sustained by a case in which there was no advisory commission furnished the President—a case to which this Court gave the fullest consideration nearly forty years ago. In *Field* v. *Clark*, 143 U. S. 649, 680, the third section of the Act of October 1, 1890, contained this provision:

"That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever, and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea and hides, the product of or exported from such designated country as follows, namely:"

Then followed certain rates of duty to be imposed. It was contended that this section delegated to the President both legislative and treaty-making powers and was unconstitutional. After an examination of all the authorities, the Court said that while Congress could not delegate legislative power to the President, this Act did not in any real sense invest the President with the power of legislation, because nothing involving the expediency or just operation of such legislation was left to the determination of the President; that the legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was merely in execution of the act of Congress. It was not the making of law. He was the mere agent of the the law-making department to ascertain and declare the event upon which its expressed will was to take effect.

Second. The second objection to Section 315 is that the declared plan of Congress, either expressly or by clear implication, formulates its rule to guide the President and his advisory Tariff Commission as one directed to a tariff system of protection that will

avoid damaging competition to the country's industries by the importation of goods from other countries at too low a rate to equalize foreign and domestic competition in the markets of the United States. It is contended that the only power of Congress in the levying of customs duties is to create revenue and that it is unconstitutional to frame the customs duties with any other view than that of revenue raising. It undoubtedly is true that during the political life of this country there has been much discussion between parties as to the wisdom of the policy of protection, and we may go further and say as to its constitutionality, but no historian, whatever his view of the wisdom of the policy of protection, would contend that Congress since the first revenue Act in 1789 has not assumed that it was within its power in making provision for the collection of revenue to put taxes upon importations and to vary the subjects of such taxes or rates in an effort to encourage the growth of the industries of the nation by protecting home production against foreign competition. It is enough to point out that the second act adopted by the Congress of the United States July 4, 1789 (ch. 2, 1 Stat. 24), contained the following recital.

"Sec. 1. Whereas it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures, that duties be laid on goods, wares and merchandises imported:

Be it enacted, etc."

In this first Congress sat many members of the Constitutional Convention of 1787. This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs long acquiesced in fixes the construction to be given its provisions. *Myers* v. *United States*, 272 U. S. 52, 175, and cases cited. The enactment and enforcement of a number of customs revenue laws drawn with a motive of maintaining a system of protection since the revenue law of 1789 are matters of history.

More than a hundred years later, the titles of the Tariff Acts of 1897 and 1909 declared the purpose of those acts, among other things, to be that of encouraging the industries of the United States. The title of the Tariff Act of 1922, of which Section 315 is a part, is "An Act to provide revenue, to regulate commerce with foreign countries, to encourage the industries of the United States

and for other purposes". Whatever we may think of the wisdom of a protection policy, we can not hold it unconstitutional.

So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes can not invalidate Congressional action. As we said in the *Child Labor Tax Case*, 259 U. S. 20, 38: "Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them, and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive". And so here the fact that Congress declares that one of its motives in fixing the rates of duty is so to fix them that they shall encourage the industries of this country in the competition with producers in other countries in the sale of goods in this country, can not invalidate a revenue act so framed. Section 315 and its provisions are within the power of Congress. The judgment of the Court of Customs Appeals is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.